TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 275. 59.

A. J. TULLOCK, PLAINTIFF IN ERROR,

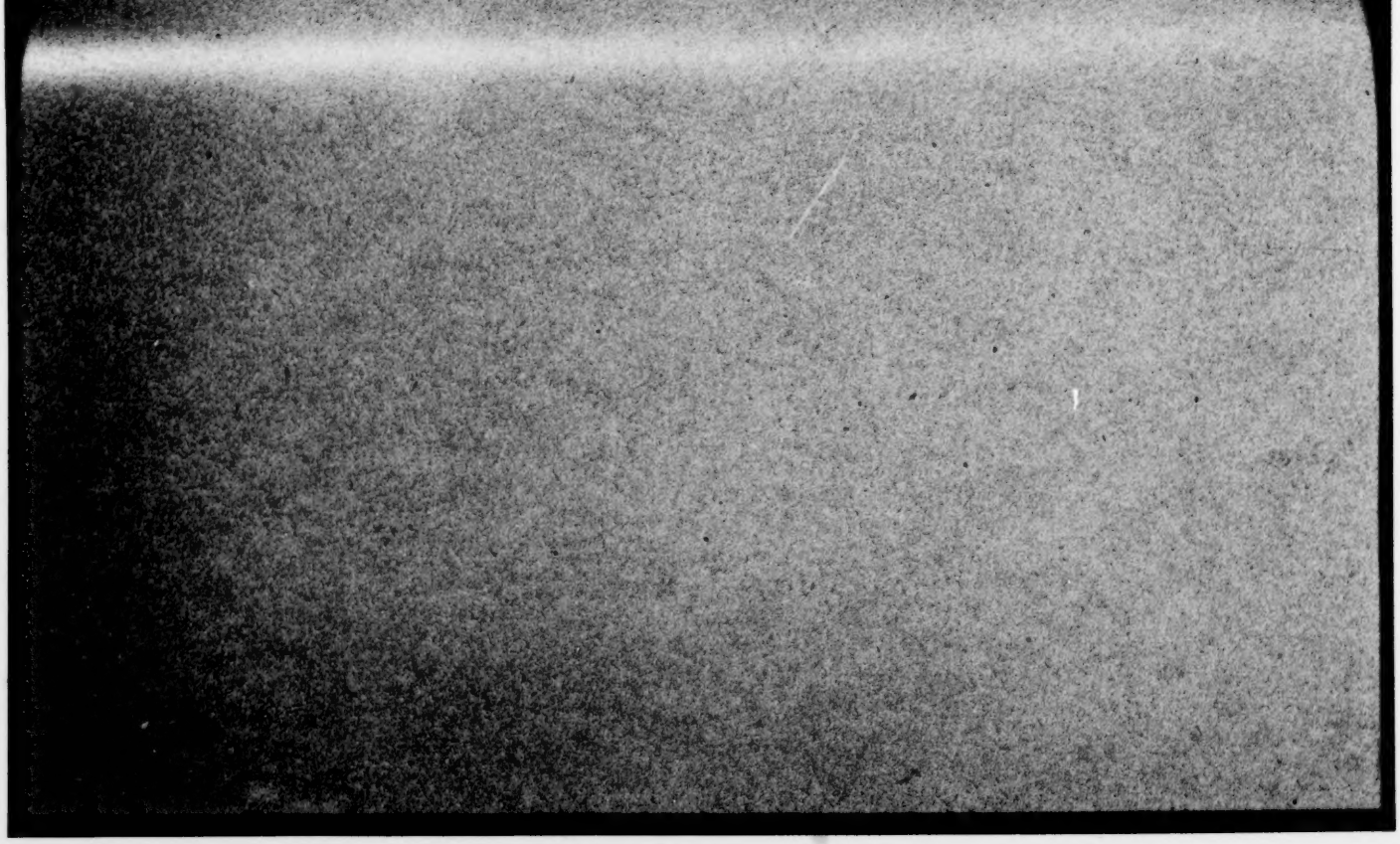
vs.

JOAB MULVANE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 10, 1900.

(17,750.)



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In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } No. 11318.

Be it remembered that on the 23rd day of November, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a waiver of the issuance and service of summons in error endorsed thereon, and with a case-made attached thereto and made a part thereof, which are in the words and figures as follows, to wit:

2 A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } 11318.

Petition in Error and Case-made.

Filed November 23, 1898.

JNO. MARTIN,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } No. —.

Petition in Error.

Comes now A. J. Tullock, the above-named plaintiff in error, and complains of the above-named defendant in error, Joab Mulvane, and alleges that at the April term, 1898, of the district court of the third judicial district of the State of Kansas said defendant in error obtained a judgment against this plaintiff in error in a certain action then pending in said district court, wherein this plaintiff in error was defendant and said defendant in error was plaintiff. The original case-made in said action, duly certified, is hereto attached, marked Exhibit A, and made a part of this petition in error.

And this plaintiff in error alleges that in the proceedings of said district court in said cause there are material and substantial errors prejudicial to the rights of this plaintiff in error, and that said errors are disclosed in said original case-made, in this, to wit:

1. That said district court admitted incompetent, irrelevant, and immaterial evidence in the trial of said cause, over the objections and exceptions of the defendant in said cause.

2. That in said trial said district court refused to admit competent, relevant, and material evidence which was offered by the defendant in said cause; to each of which refusals and rulings of the court the defendant in said cause objected and excepted at the time.

3. That in said trial said district court erred in giving to the jury certain instructions; to all of which the defendant in said cause objected and excepted at the time.

4. That in said trial said district court erred in refusing to give to the jury certain instructions requested by the defendant in said cause; to which refusal said defendant objected and excepted at the time.

5. That in said trial said district court erred in allowing, as an element of damage, attorneys' fees paid for legal services rendered in the case of Wescott & Hanson *vs.* Mulvane *et al.*, in the United States circuit court for the district of Kansas; to which ruling of the court the defendant in said cause objected and excepted at the time.

6. That said district court erred in overruling the motion of the defendant in said cause for a new trial; to which ruling said defendant objected and excepted at the time.

7. That said district court erred in rendering judgment in favor of the plaintiff in said cause and against the defendant therein.

8. That in said trial said district court erred in its rulings in matters of law; to each of which rulings the defendant objected and excepted at the time.

Wherefore this plaintiff in error prays that said judgment of said district court may be reversed and set aside, and that he be restored to all things which he has lost by reason thereof.

ROSSINGTON, SMITH & DALLAS,
CLIFFORD HISTED,
Attorneys for Plaintiff in Error.

We do hereby waive the issuance and service of summons in error in the above-entitled action.

Topeka, Kansas, November 19th, 1898.

A. L. WILLIAMS &
N. H. LOOMIS,
Attorneys for Defendant in Error.

4 EXHIBIT A.

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5 In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012. Case-made.

Be it remembered that on the 5th day of November, 1892, there was filed in the office of the clerk of the circuit court of Shawnee county, Kansas, a petition, which is in words and figures as follows, to wit:

In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK and W. M. D. LEE, Defendants.

Petition.

Plaintiff alleges that upon or about the 13th day of February, 1890, in an action pending in the circuit court of the United States for the district of Kansas wherein George P. Wescott and Samuel Hanson were complainants and Joab Mulvane, the plaintiff above mentioned, and others were defendants, a temporary injunction was issued out of the said court and served upon said defendants enjoining them from putting on record any deed or conveyance to the franchises and property of the water works of the city of Topeka, Shawnee county, Kansas, which upon the 14th day of December, 1889, were owned, controlled, and operated by the said Topeka Water Supply Company; also from signing, sealing, or negotiating any bonds which were proposed to be issued by the Topeka Water Company, a new corporation to be organized for the purpose of owning, controlling, and operating the said water works, and from carrying on any negotiations with reference to said bonds in the way of executing, delivering, or putting said bonds upon the market or requesting the trustee named in said bonds to certify to said bonds or from requesting said trustee to act in any matter in connection with the scheme or enterprise looking to the formation of the Topeka Water Company and its acquirement of the franchise of the Topeka Water Supply Company; also from selling any of the capital stock of said Topeka Water *Supply* Company or of said Topeka Water Supply Company; also from offering said stock of the Topeka Water Supply Company or the Topeka Water Company upon the market, or from cancelling any of the stock of the said Topeka Water Supply Company, or from turning over the books of said Topeka Water Supply Company, or from in anywise impairing, affecting, or terminating the active existence of said Topeka Water Supply Company as the owner and operator of said works, or from delivering or assigning any of the stock of the Topeka Water Company to any person or persons whatsoever.

Plaintiff further alleges that said temporary injunction was allowed by said court upon condition that the complainants therein should give bond to the defendants therein, in accordance to law, in the sum of seventy-five thousand dollars; that afterwards the said circuit court of the United States made an order allowing complainants to deposit with the clerk of said court the sum of seventy-five thousand dollars cash in lieu of the bond required to be given as aforesaid, which cash deposit was made by said complainants with the clerk of said court; that thereafter complainants were allowed by the court to withdraw said cash deposit upon their giving a bond in lieu thereof.

Plaintiff further alleges that in accordance with said order of said

circuit court of the United States said complainants gave to said Joab Mulvane and his codefendants in that suit a bond signed by said George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock and W. M. D. Lee, the defendants in this case, as sureties. Said bond is in words and figures as follows:

6 Know all men by these presents that we, George P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts, hereby constitute and appoint Rossington, Smith & Dallas, of Topeka, Kansas, our true and lawful attorney, for us and each of us, in our names and stead, to sign, execute, and deliver for us, as principals, a certain injunction bond for the penal sum of seventy-five thousand dollars, dated May 23, 1890, with A. J. Tullock and W. M. B. Lee, as sureties, in a certain cause pending in the circuit court of the United States at said Topeka, wherein we are complainants and Mulvane and others are defendants, and we hereby adopt and confirm the signing of said bond, as above already done, and agree to be bound thereby fully as if made by ourselves, and do hereby declare that our said attorneys had full power and authority in the premises.

Hereby granting our said attorneys full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and we do hereby fully confirm and adopt all acts done for us and in our respective names by our said attorneys in the premises prior to the actual execution of these presents by us.

In witness whereof we hereto set our hands and seals May 28, 1890.

GEO. P. WESCOTT.
SAML HANSON. [SEAL.]

MASSACHUSETTS, *Suffolk*, } ss:

AT BOSTON, *May* 28, 1890.

Personally appeared said Samuel Hanson, to me known, and acknowledged the foregoing instrument by him subscribed to be his free act and deed.

Before me—

JOHN R. BALLARD,
Notary Public. [SEAL.]

MAINE, *Cumberland*, } ss:

AT PORTLAND, *May* 28, 1890.

Personally appeared said George P. Wescott, to me known, and acknowledged the foregoing instrument by him subscribed to be his free act and deed.

Before me—

NATHAN CLEAVES,
Notary Public. [SEAL.]

Know all men by these presents that we, George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties, are held and firmly bound unto Joab Mulvane, the Topeka Water Supply Company, a corporation; the Topeka Water Company, a corporation; William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, a corporation, in the sum of seventy-five thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in a certain suit pending in the circuit court of the United States for the district of Kansas, wherein the said George P. Wescott and Samuel Hanson are complainants and the said Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and The Atlantic Trust Company are defendants, a temporary restraining order was upon the filing of a bill in said suit granted and issued against said defendants, and afterwards and on the 13th day of February, 1890, it was ordered by said court that upon said complainants giving a bond, to be approved by the court, in the sum of seventy-five thousand dollars, within two days thereafter, conditioned that the said complainants should pay all damages to the said defendants against whom said injunction was granted, resulting from the granting of said restraining order and said injunction, provided that it should be ultimately held that the
7 said injunction or said restraining order were unlawfully granted, a temporary injunction should be granted and issued in said suit in favor of said complainants and against said defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company; and whereas within the period, as aforesaid, limited for the giving of said bond the said complainants applied to the court for an order to deposit with the clerk of said court in lieu of the bond, as aforesaid, the sum of seventy-five thousand dollars in cash, which said order was granted, and said sum of seventy-five thousand dollars in cash was thereupon deposited with said clerk, and said money was so received in lieu of said bond, and thereupon said temporary injunction issued as upon a bond being given; and whereas upon the application of said complainants, as aforesaid, for leave to substitute a bond for said cash deposit, as aforesaid, leave was granted to give a bond to be approved by the court, and upon approval thereof said complainants should be permitted to withdraw said cash deposit in the hands of the clerk; and whereas before the filing and approval of said bond last as aforesaid the said injunction so as aforesaid allowed was, upon motion of certain defendants herein, by one of the judges of said court dissolved;

Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay or cause to be paid to the said Joab Mulvane, the Topeka

Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners, doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company and to each of them all damages which they or either of them have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above obligation shall be null and void; otherwise shall be and remain in full force and effect.

In witness whereof we have hereunto set our hands this 23d day of May, A. D. 1890.

A. J. TULLOCK.
W. M. D. LEE.
GEORGE P. WESCOTT.
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.
SAMUEL HANSON.
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.

Approved May 24, 1890.

C. G. FOSTER, *Judge.*

STATE OF MISSOURI, }
County of Jackson, }

A. J. Tullock, being first duly sworn, deposes and says that he is worth, over and above all debts, exemptions, and liabilities, the sum of seventy-five thousand dollars and further affiant saith not.

A. J. TULLOCK.

Subscribed and sworn to before me this 23d day of May, 1890.

HARRY G. CRAIN,
Notary Public, Jackson Co., Mo. [SEAL.]

Commission expires June 17th, 1891.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

W. M. D. Lee, being first duly sworn, deposes and says that he is worth, over and above all debts, exemptions, and liabilities, the sum of seventy-five thousand dollars; and further affiant saith not.

W. M. D. LEE.

Subscribed and sworn to before me this 23d day of May, 1890.

HARRY G. CRAIN,
Notary Public, Jackson Co., Mo. [SEAL.]

Commission expires June 17th, 1891.

Endorsed: "No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Injunction bond. Filed June 3, 1890. Geo. F. Sharitt, clerk."

8 Plaintiff further alleges that said bond was approved by the said court and the said cash deposit of seventy-five thousand dollars withdrawn by said complainants from the clerk of said court.

Plaintiff further alleges that such further proceedings were had in the said suit pending in the circuit court of the United States for the district of Kansas that it was finally decided that the said temporary injunction was unlawfully issued and that the said complainants were not entitled to the said injunction. (See page 257 of this case-made for amendments to petition to be here inserted.)

Plaintiff further alleges that he has suffered damages caused by the issuance of said injunction in the sum of seventy-five thousand dollars, for which sum of money he prays judgment.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

To the clerk of said court:

Please issue summons in the above-entitled case, directed to the sheriff of Shawnee county, and make returnable in accordance to law. Suit brought to recover $75,000.00, damages.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

Afterwards and on the 8th day of April, 1893, there was filed in the office of the clerk of said circuit court, by and with the written consent of the plaintiff's attorneys, an answer of the defendant A. J. Tullock, which is in words and figures as follows, to wit:

"In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.) Answer of the Defendant
A. J. TULLOCK ET AL., Defendants.) A. J. Tullock.

Now comes said defendant, A. J. Tullock, and for answer to the petition of the plaintiff filed herein says:

I. That he denies each and every, all and singular, the allegations and averments in said petition contained.

II. And for a second and further ground of defense to said petition said defendant says that he admits the execution of the bond in said petition contained, but denies that said bond has become absolute or any liability has accrued to this defendant thereon.

And said defendant, further answering, says that on the 26th day of September, 1892, in the said cause referred to in the petition

herein, being the suit of Wescott and Hanson *vs.* Mulvane, in the circuit court of the United States for the district of Kansas, a decree was entered dismissing the bill of complaint of the said Wescott and Hanson; that thereafter and on the 19th day of December, 1892, and within the time allowed by law, the said Wescott and Hanson, complainants in said bill, filed their certain assignments and specifications of error in said cause and prayed the allowance of an appeal therein to the United States circuit court of appeals, which was thereupon by the court allowed and a supersedeas bond fixed at $1,000; that among the assignments of error made by the said Wescott and Hanson in said cause was the order of the said United States circuit court dissolving the temporary injunction theretofore issued in said cause; that in pursuance of the allowance of said appeal a supersedeas bond has been duly filed by the said Wescott and Hanson and duly approved in said cause, and citation has been issued therein and served upon the said Joab Mulvane, the plaintiff herein and defendant in said cause; that a duly certified transcript of the record and proceedings in said circuit court has been filed in the United States circuit court of appeals for the eighth circuit within the time and in the manner prescribed by law, and said cause is now pending upon appeal of the said Wescott
9 and Hanson in said last-mentioned court.

Wherefore said defendant prays that he may go hence without day and recover his costs herein. (See page 256 of this case-made for amendments to answer made during trial.)

ROSSINGTON, SMITH AND DALLAS,
Attorneys for Defendant A. J. Tullock."

Afterwards and on the 18th day of April, 1893, there was filed in the office of the clerk of said circuit court a reply, which is in words and figures as follows, to wit:

"In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.
A. J. TULLOCK ET AL., Defendants.)

Reply.

1. Now comes the above-named plaintiff, and for reply to the answer of the defendant Tullock, filed herein, denies each and every allegation thereof inconsistent with the allegations of plaintiff's petition.

2. For further reply to said answer, plaintiff denies that in said cause pending in the United States circuit court for the district of Kansas the court fixed the amount of a supersedeas bond at $1,000, as set forth in defendant's answer, and alleges the fact to be that the supersedeas bond fixed by the court in said cause was to supersede the decree for costs only, and is so stated in the decree rendered therein; and plaintiff further alleges that the bond filed in said

cause and referred to in defendant's answer is a bond to supersede the decree for costs in said cause only, and plaintiff denies the execution of any supersedeas bond, as alleged in defendant's answer.

WILLIAMS AND DILLON,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

STATE OF KANSAS,)
Shawnee County,) ss:

N. H. Loomis, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled cause, and that the allegations contained in the second paragraph of the foregoing reply are true, as he verily believes.

N. H. LOOMIS.

Subscribed and sworn to before me this 17th day of April, 1893.
[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires Feb. 27, 1894."

Afterwards and on the 4th day of February, 1895, said cause came regularly on for trial in said circuit court, was tried, and judgment rendered therein. An appeal was taken from the judgment of said circuit court to the supreme court of the State of Kansas, and the opinion of the supreme court in said case is reported in 58 Kan., at page 622. The mandate of the supreme court ordering a new trial of said cause was received with a copy of said opinion and filed in the office of the clerk of the district court of Shawnee county, Kansas, on the 29th day of November, 1897. Motion of the plaintiff to spread said mandate of record was duly made and the same was duly spread of record, as more fully appears from the following copy of an entry which was made upon the journal of the court in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.) No. —.
A. J. TULLOCK and W. M. D. LEE, Defendants.)

Upon this 24th day of January, 1898, comes Joab Mulvane, plaintiff, by Williams & Dillon, his attorneys, and presents to the court the mandate of the supreme court of the State of Kansas in
10 the above-entitled cause, directing a reversal of the judgment of the lower court herein and ordering a new trial of said cause, and upon motion of plaintiff it is ordered that said mandate be spread upon the records of this court; that the judgment heretofore rendered herein by the circuit court of Shawnee county, Kansas, be, and the same is hereby, reversed and set aside and plaintiff granted a new trial in accordance with the mandate of the supreme

court, and the clerk of this court is hereby directed to enter said cause upon the trial docket for hearing.

Z. T. HAZEN, *Judge.*

O K.

A. L. WILLIAMS,
Attorneys for Plaintiff.
ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant A. J. Tullock."

Afterwards and on Thursday, the 16th day of June, 1898, this action came regularly on for trial. The plaintiff appeared in person and by A. L. Williams and N. H. Loomis, his attorneys, and the defendant appeared by Rossington, Smith & Dallas and Clifford Histed, his attorneys. A jury was duly and regularly called and sworn, as required by law, to try the case, and a preliminary statement was made to the jury on behalf of each party in interest. Thereupon the plaintiff, to maintain the issues upon his part, produced and offered evidence as follows:

Mr. LOOMIS: We offer in evidence the whole record in the case of George P. Wescott and Samuel Hansom *vs.* Joab Mulvane, No. 230, pending in the U. S. court of appeals from the U. S. circuit court for the district of Kansas. This record is enclosed in the case-made in the supreme court of the State of Kansas in the case entitled Joab Mulvane, plaintiff in error, *vs.* A. J. Tullock, defendant in error, being No. 10214.

Mr. HISTED: The defendant objects to the admission of the order of the court dismissing the appeal as against the Topeka Water Supply Company and the two water companies on pages 102 and 103 of the record as incompetent, irrelevant, and immaterial, and if it is offered for the purpose of showing a termination of the injunction suit which could authorize the bringing of this action on the bond, it is insufficient for that purpose and is a variance from the allegations of the petition with reference to the termination of the injunction suit, and for the reason that it does not appear there to have been finally decided that said injunction ought not to have been granted, that being the allegation in the petition.

The COURT: It is part of the record in this case?

Mr. HISTED: Yes, sir.

The COURT: I think the entire record is admissible; the objection will be overruled, because I think the entire record is competent. The defendant excepted to the ruling of the court. Said record is hereto attached, marked Exhibit A, and made a part of this case-made.

Mr. LOOMIS: In connection with this I offer in evidence the opinion of the United States court of appeals in this case based upon the record which has been introduced in evidence. It is found on page 13 of the record of the supreme court of the State of Kansas in the case entitled Joab Mulvane against A. J. Tullock, No. 10214.

Mr. HISTED: We object to the opinion as incompetent, irrelevant, and immaterial and because it is a matter that occurred subsequent to this suit and could not affect the rights of the parties here.

The COURT: Upon what theory is that competent?

Mr. LOOMIS: As part of the whole case and also upon this propo
sition: The court of appeals holds in that case that the dismissal
that portion of the case relating to the specific performance of th
contract amounted to a dismissal of the injunction part of the pr
ceedings at that time, and therefore that the ruling of the cou
below was final upon the question as to whether an injunction wa
properly granted or not.

11 The COURT: The objection will be sustained; I don't thin
the opinion is competent. I take it that the fact that th
temporary injunction was dissolved is conclusive upon that propos
tion, and when you have shown that the injunction was dissolve
that presumption will continue until the other side show that son
court has reversed that decision. I don't think the opinion of th
court is competent.

The plaintiff excepted to the ruling of the court.

Mr. LOOMIS: Now, if your honor please, I desire to call attentio
of the jury to portions of this record and read it to the jury, of cours
not the whole record, but some of the parts which bear more pa
ticularly upon it.

The COURT: Either party may read any portion of the recor
which he desires if there is no objection, but if there is objection
course the whole record will have to be read.

Mr. HISTED: We don't insist on that.

Counsel for the plaintiff read to the jury the following: Restrain
ing order, found on page fourteen of the printed record; temporar
injunction, found on page forty-one of the printed record; order f
cash deposit, found on page forty-two of the printed record; ord
for the clerk to turn over to the plaintiffs seventy-five thousand do
lars and bond for injunction having been substituted and filed; i
junction bond given, found on page ninety-three of the printed recor

Mr. LOOMIS: We offer in evidence the original injunction bond,
copy of which is found on page ninety-three of the printed recor
Said original injunction bond was marked A B for identification, wa
read to the court and jury, and is in words and figures the same
the copy thereof which appears on page ninety-three of the printe
record hereinafter set out. Counsel continued to read to the jur
from the printed record, as follows: Motion to dissolve, found on pag
seventy-six of the printed record; order dissolving the injunctio
found on page eighty-eight of the printed record.

Mr. HISTED: We object to that order for the reason that it wa
made by a judge at chambers out of the district, and he was ther
fore without jurisdiction.

The court overruled the objection; to which ruling the defenda
at the time excepted.

Counsel for plaintiff next read from the printed record the stipu
lation dismissing the equitable features of the bill, found on pag
one hundred — two of the printed record.

Mr. HISTED: We make the same objection to that, because ther
is a variance between that and the allegations in the petition in th
case.

The court overruled the objection; to which ruling the defendant at the time excepted.

Mr. Loomis: Now, I desire to read the decree entered by Judge Riner on the merits of the case. I will read from the original, which is also a part of the record, but there were some additions made afterwards, and it was claimed that it operated as a supersedeas, and I read the original to show that it was not intended as a supersedeas on the giving of a bond in that case. Said original decree was marked A C for identification, and is in words and figures as follows, to wit:

"In the Circuit Court of the United States for the District of Kansas.

George P. Wescott and Samuel Hanson, Plaintiffs,
vs.
Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawset Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Decree.

12 This cause, having been heretofore dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard upon the bill of complaint herein, the answer thereto of the said defendant, Joab Mulvane; the replication of the complainants to said answer, and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed that the said complainants' bill of complaint be, and the same is hereby, dismissed with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainant, supersedeas bond is fixed at the sum of $1,000.00 to supersede the decree for costs in this cause and appeal allowed.

JOHN A. RINER, *Judge.*"

Mr. Loomis: I now offer in evidence the mandate from the U. S. circuit court of appeals in this case.

Mr. Smith: We object to that because it was matter that occurred long subsequent to the commencement of this suit.

The Court: I don't think it is material, and the objection will be sustained.

The plaintiff excepted to the ruling of the court.

JOAB MULVANE, the plaintiff, called as a witness in his own behal being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.
A. Joab Mulvane.
Q. Where do you reside, Mr. Mulvane?
A. In the city of Topeka.
Q. How long have you lived here?
A. About twenty-two years.
Q. Are you the same Joab Mulvane who was one of the defend ants in the case pending in the United States circuit court for th district of Kansas, in which Wescott & Hanson were complainant and Joab Mulvane, The Topeka Water Supply Company, The Topek Water Company, Coffin & Stanton, and others were defendants?
A. I am.
Q. When did you first receive notice that suit was brought agains you with reference to the time that the restraining order was serve upon you in that case?
A. You mean notice of the restraining order?
Q. Yes, sir; when, with reference to the time that you learned tha suit was brought?
A. I think I received service on the 5th of February, 1890.
Q. When did you first learn that the suit was brought agains you?
A. That was the first, I think, that I had of the suit.
Q. The service of the restraining order?
A. Yes, sir.
Q. At that time did you have a contract with Coffin & Stanton an Woodbury & Moulton for the conveyance of the capital stock of th Topeka Water Supply Company?
A. I did.
Q. And this restraining order prevented you from carrying ou that contract?

Counsel for the defendant objected to the question as calling fo that which is not the best evidence and for incompetent, irrelevan and immaterial testimony. The court sustained the objection; t which ruling the plaintiff at the time excepted.

Q. After the restraining order was served upon you what did yo do to prevent the allowance of a temporary injunction in the case?
A. I immediately employed attorneys.
Q. Who was the first attorney you employed?
A. Mr. J. D. McFarland, is my recollection.
Q. For what purpose did you employ him?
13 A. To dissolve or prevent the granting of a temporary in junction and to dissolve it if granted.
Q. What other attorney, if any, did you employ?
A. Hurd and Dunlap, Mr. Eugene Hagan, and Mr. A. L. William

Q. Was Mr. Williams employed before the temporary injunction was granted or afterwards?

A. Afterwards.

Q. The Hurd & Dunlap that you refer to, were they connected in anywise or were they the same gentlemen who were connected with the Santa Fé law department?

A. Yes, sir.

Q. What are Mr. Hurd's initials?

A. A. A., is my recollection.

Q. What was his connection with the Santa Fé law department at that time?

A. He is at the head of the law department for this State, and I don't know whether further than that or not.

Q. Was Mr. Dunlap the same Dunlap who was associated with Mr. Hurd in the Santa Fé law department?

A. Yes, sir.

Q. You also employed Eugene Hagan?

A. Yes, sir.

Q. And then after the temporary injunction was allowed you employed A. L. Williams?

A. Yes, sir.

Q. State whether or not those attorneys appeared for you.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and for that which is not the best evidence. The court overruled the objection; to which ruling of the court the defendant at the time excepted.

A. They did.

Q. For what purpose were those attorneys employed?

A. Hurd and Dunlap and Eugene Hagan and A. L. Williams to aid in preventing the granting of an injunction, to secure the dissolution of an injunction if granted.

Q. Do you remember how many hearings you had before Judge Foster?

A. My recollection is that there were two.

Q. First upon what proceedings?

A. Upon the granting of a temporary injunction.

Q. What ruling did Judge Foster make upon that?

Counsel for the defendant objected to the question as calling for that which is not the best evidence and as asking for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. What was the other appearance your attorney made for you before Judge Foster?

A. To dissolve the injunction, is my recollection, and it may be to introduce the testimony of Woodbury and Moulton and dissolve the temporary injunction.

Q. Was there a hearing afterwards had before Judge Caldwell?

A. Yes, sir.

Q. At what place?

A. At Little Rock, Arkansas.
Q. How many of your attorneys were with you at that place?
A. Mr. Hurd, Mr. Williams, Mr. McFarland, and Mr. Hagan.
Q. Who paid the expenses of your attorneys on that trip?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. I paid the expenses.
Q. After the temporary injunction was dissolved, Mr. Mulvane, did the attorneys employed by you for the purpose of preventing the issuance of the injunction and to obtain its dissolution present bills for their services in connection with the injunction?
A. They did.
Q. What was the amount of the bill of J. D. McFarland?

Mr. HISTED: The defendant objects to that question for the reason that it is asking for incompetent, irrelevant, and immaterial testimony and because it attempts to prove special damages, which
14 are not authorized by the pleadings in this case, and also because it further confounds elements of damages for attorneys' fees, which, even though pleaded, could not be included as damages with others. The defendant objects to any testimony concerning damages on account of the payment of attorneys for resisting the application for a temporary injunction, and contends that even if pleaded the only damages which the plaintiff could recover would be damages in obtaining a dissolution of the injunction. The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceedings in Federal courts attorneys' fees are not included.

The court overruled the objection; to which ruling the defendant at the time excepted.

Mr. HISTED: And the defendant also objects because so much of the condition of the bond as purports to create a liability by reason of the *condition of the bond as purports to create a liability by reason of the* resistance of the temporary injunction and of the restraining order was entirely without any consideration therefor, and could not fix a liability by reason of such upon this defendant surety.

The court overruled the objection; to which ruling the defendant at the time excepted.

Q. (The question was repeated to the witness.)
A. Four thousand dollars.
Q. Did you pay it?
A. I did.
Q. What was the date of the payment?
A. May 24, 1890.
Q. Did Mr. McFarland give you a receipt?
A. He did.

Q. Have you it with you?
A. Yes, sir.
Q. Please produce it.

The receipt referred to was handed to counsel and was marked B C for identification.

Mr. LOOMIS: We offer this receipt in evidence.

Said receipt was read to the court and jury and is in words and figures as follows, to wit:

"J. D. McFarland, attorney and counselor at law, Bank of Topeka building, Topeka, Kansas.

United States Circuit Court, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Received May 24, 1890, of Joab Mulvane four thousand dollars for legal services rendered for defendants in above cause in the (*in the*) matter of procuring a dissolution of the temporary injunction granted therein.

J. D. McFARLAND."

Q. State, Mr. Mulvane, whether or not the amount of four thousand dollars paid to Mr. McFarland was for any other services than those rendered in your behalf in connection with the injunction proceedings in that particular case.

Counsel for the defendant objected to the question as leading and as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. They were solely for my benefit, and no other, that I am aware of.

Q. State whether or not they were for any other services in the case than those connected with the injunction proceedings in the case.

Counsel for the defendant objected to the question as leading and as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

A. They were not.

15 Counsel for the defendant moved the court to strike out the answer of the witness, and the court sustained the objection; to which ruling the plaintiff excepted at the time.

Q. I will ask you, Mr. Mulvane, to state what this payment of $4,000 was made to Mr. McFarland for.

A. For all legal services rendered to me by Mr. J. D. McFarland

in the matter of the injunction case in the suit between myself and Wescott and Hanson.

Q. State whether or not Mr. McFarland was employed by you to represent you upon the merits of the case.

A. He was not. By the merits you mean after the dissolution of the injunction?

Q. I mean any portion of the case which had reference to anything other than the injunction proceedings.

A. No, sir; he was not.

Q. State whether or not Mr. A. L. Williams made a charge against you for services performed in that case in connection with the injunction proceedings exclusively.

A. He did.

Q. What was the amount of his?

Mr. HISTED: We object to all this testimony with reference to attorneys' fees on the same grounds that were specifically set out above, and we want it understood that it all goes in subject to objection already made.

The court overruled the objection; to which ruling the defendant at the time excepted.

Q. (The question was read to the witness.)

A. Three thousand dollars.

Q. Did you pay it?

A. I did.

Q. When?

A. On the 30th day of April, 1890.

Q. Did Mr. Williams also represent you upon the merits of the case?

A. He did subsequently.

Q. State whether or not he made a separate charge for the services rendered upon the merits.

A. He did.

Q. State whether or not Hurd & Dunlap made a charge for services rendered in your behalf in connection with the injunction proceedings in that case exclusively.

A. They did.

Q. Were they employed to represent you on the merits of the case?

A. No, sir.

Q. Did they drop out of the case after the injunction was dissolved?

A. They did.

Q. Who was the only attorney that represented you after the injunction was dissolved upon the merits?

A. A. L. Williams.

Q. What was the amount of the bill of Hurd & Dunlap?

Counsel for the defendant objected to the question upon the same grounds recited in the objection above set out and because the same calls for incompetent, irrelevant, and immaterial testimony. The

court overruled the objection; to which ruling the defendant at the time excepted.

A. Six thousand dollars.
Q. Did you pay it?
A. I did.
Q. When?
A. April 14, 1890.
Q. State whether or not Eugene Hagan made a charge against you for services performed in your behalf in connection with the injunction proceedings in that case—that is to say, in resisting the allowance of the temporary injunction and in procuring its dissolution—exclusively.
A. He did.
Q. What was the amount of his bill?
A. Three thousand dollars.
Q. Did you pay it?
A. I did.
Q. When?
A. The 17th day of April, 1890.
Q. Now, you have already stated that you paid some expenses of your attorneys on the trip to Little Rock when the case was heard before Judge Caldwell. I wish you would state the amount which you actually paid out for expenses of yourself and attorneys
16 in making that trip to and from Little Rock.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony, and because the matter covered by the question is not pleaded in this case. The court overruled the objection; to which ruling the defendant at the time excepted.

A. $128.68 on April 6th.
Q. What is the date of that payment?
A. The payments were made on and before April 6th, 1890. I have entered them on my account as of April 6th.
Q. Is that the date of the last payment?
A. Yes, sir.
Q. On March 31st did you make any payments for expenses in connection with these injunction proceedings?
A. I did.
Q. What was the nature of these expenses?
A. I paid Mr. A. L. Williams $75.00 for expenses.
Q. For what?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony, and also upon the grounds recited in the objection hereinbefore set out. The court overruled the objection; to which ruling the defendant at the time excepted.

A. For expenses to Little Rock.
Q. In connection with these injunction proceedings?
A. Yes, sir.

Q. Was that over and above the amount of his fees that he charged?

A. Yes, sir; this was incidental expense outside of the amount I paid him as a fee.

Q. What was the date of the payment?

A. The 31st of March, 1890.

Q. Did you make any other separate payment of expenses to your attorneys?

A. Yes, sir.

Q. When?

Counsel for the defendant objected to the question on the same grounds as stated above as to special damages, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. On March 11, 1890, I paid Eugene Hagan, expenses to Little Rock to see the court or judge with reference to hearing, $50.00.

Q. That is the hearing in connection with the injunction—in connection with the motion to dissolve the temporary injunction?

A. Yes, sir.

Q. Did you pay any costs in connection with the injunction proceedings in the Federal court to the clerk of the United States court in which the case was pending?

A. I did.

Counsel for the defendant objected to the question upon the same grounds recited above, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

Q. State the payments made to the clerk for costs in connection with the injunction proceedings.

A. I paid Mr. George F. Sharitt in this injunction matter, on March 11, 1890, $20.00; on February 5, 1890, $34.55; also April 11, 1890, $37.25, for which I have receipts.

Q. Please produce those receipts.

Mr. Histed: The defendant especially objects to any testimony with reference to costs paid in the case in the Federal court as incompetent, irrelevant, and immaterial.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. Here are the bills.

17 Q. Was not the date which you gave as February 5th February 15th, Mr. Mulvane?

A. No, sir. I have it the 5th here. I have the original check, which would show the exact date, and I think it is correct.

Mr. Loomis: I now offer these receipts of Mr. Sharitt in evidence.

Q. These are the bills made out by the clerk, are they?

A. Yes, sir.

The receipts referred to were marked respectively, for identification, C 1, C 2, and C 3 and are respectively in words and figures as follows, to wit:

"Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Sharitt, clerk.

TOPEKA, KANSAS, *March* 10, 1890.

GEORGE P. WESCOTT ET AL., Complainants,
vs.
JOAB MULVANE ET AL., Defendants. } Case No. 6448.

The deposit of $34.55 made by you in the above-entitled case is exhausted and a balance of $— now due on account of clerk's fees. I therefore urge upon you the *the* necessity of making an additional deposit of $20.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case — behalf of defendants.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

Joab Mulvane, Topeka, Kansas.

Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Sharitt, clerk.

TOPEKA, KANSAS, *Feb'y* 15, 1890.

GEO. P. WESCOTT ET AL.
vs.
JOAB MULVANE ET AL. } Case No. 6448.

No deposit by you made on behalf of defendants in the above-entitled case, and a balance of $35.55 now due on account of clerk's fees. I therefore urge upon you the necessity of paying this balance and of making an additional deposit of $10.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

J. D. McFarland, A. A. Hurd, and E. Hagan, attorneys-at-law, Topeka, Kansas."

Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Shariff, clerk.

TOPEKA, KANSAS, *April 11th*, 1890.

GEO. P. WESCOTT ET AL.
vs.
JOAB MULVANE ET AL. } Case No. 6448.

The deposits of $34.55 and $20.00 made by you on behalf of def'ts in the above-entitled case are exhausted and a balance of $17.25 now due on account of clerk's fees made by def'ts. I therefore urge upon you the necessity of paying said balance and of making an additional deposit of $20.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

A. L. Williams, A. A. Hurd, E. Hagan, J. D. McFarland, and Silas Jones, attorneys-at-law, Topeka, Kansas."

Q. Did you get receipts afterwards?

A. These bills are not receipted, but I have the original checks.

Q. Look at the bill about which I asked you as to date.

A. Well, I think you are correct. I made a mistake there. It would be the 15th of February.

18 Q. Did you get receipts from Hurd & Dunlap for fees paid them?

A. Yes, sir.

Q. Please produce them.

Witness produced the receipt referred to, and it was marked D 1 for identification.

Mr. LOOMIS: I offer in evidence this receipt from Hurd and Dunlap.

Said receipt was read to the court and jury and is in words and figures as follows, to wit:

"Topeka, Kansas, April 14th, 1890. Joab Mulvane, the Topeka Water Supply Company, & the Topeka Water Company to Hurd & Dunlap, Dr., for professional services in procuring dissolution of temporary injunction in case of Wescott and Hanson *vs.* Joab Mulvane *et al.* in United States circuit court for district of Kansas, $6,000.00. Received payment, Hurd & Dunlap."

Q. Did you take any receipts from Mr. Hagan and Mr. Williams?

A. I think in neither case. I have Mr. Hagan's bill, but — was put into his account.

Q. Was the bill signed when the payment was made?

A. I don't think it was. I think the amount was placed to his credit, but I think I have the check for the amount.

Q. Have you got the check you paid him with?
A. I think I can find it. I have not got it with me.
Q. How about the payment made to Mr. Williams? You took no receipts?
A. Yes, sir; I have the check, but I have not it with me, but I have seen it since in looking over the papers.
Q. Did you pay any stenographer's fees in connection with the proceedings relating to the restraining order or temporary injunction in that case?
A. I did.
Q. To whom was the payment made, and when and for how much?

Counsel for the defendant objected to the question upon the same grounds as stated above and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. I paid C. V. Safford for preparation of injunction papers or in connection with that, February 24, 1890, $6.00.
Q. This, you say, was for preparing papers relating to the injunction proceedings?
A. I so understood it.
Q. Who employed Mr. Safford?
A. My attorney.
Q. State whether or not they approved the bill of Mr. Safford.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

Q. Is this the bill that Mr. Safford presented?
A. That is the bill, and it was approved at the time by the attorney?
Q. Just orally?
A. Yes, sir.

The paper referred to is marked D 3 for identification and is in words and figures as follows, to wit:

"Topeka, Kansas, 3, 8, '90. Joab Mulvane, Dr., to C. V. Safford, to services as stenographer, Feb'y 24, $6.00. Received payment, C. V. Safford."

Q. State whether or not you paid any telegraph bills made necessary by this injunction proceeding.
A. I did.
Q. When and how much?

Mr. Histed: We make the same objection to this testimony upon the same grounds as the other.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. April 26, 1890, I think was the date of the last payment, seventy dollars and sixty cents.

Q. State whether or not you paid any expenses of D. W. Mulvane to New York.

A. I did.

Q. How many trips were there?

A. Two trips.

19 Q. What was the nature of those expenses?

A. Traveling expenses, board while there, and reasonable compensation for time.

Q. What was the object in sending D. W. Mulvane to New York upon those trips?

A. I had sold the stock under contract to Coffin & Stanton and Woodbury & Moulton, and was under obligation to turn it over on the tenth of February, 1890; had been paid fifty thousand dollars on the contract, and the injunction or restraining order on the fifth of February prevented me from doing so.

Counsel for the defendant objected to the question and to the answer of the witness as incompetent, irrelevant, and immaterial and because the answer states that which is not the best evidence. The court sustains the objection; to which ruling the plaintiff excepted at the time.

The COURT: The question is, how did you come to send him to the East?

A. Being restrained by the order of the United States court from carrying out my contract——

The COURT: Don't state what the contents of the order was or the injunction, but state the purpose for which you sent him East.

A. Having sold the property, as I said, to Coffin & Stanton, parties in New York city, and being unable to comply with my contract by reason of a restraining order, I found it necessary to acquaint them with all the facts in the case and the reason why I could not comply with my contract with them and to induce them or convince them that I would ultimately comply with the contract, and that I felt that I would be released from the embargo or restraining order, and that I had complied in every other respect with my contract and was able to make good my intentions in that regard, to satisfy them in reference to the whole matter. I was to have delivered the bonds executed by the new company in the organization which they required me to establish, and these bonds——

Counsel for the defendant objected to the answer of the witness as incompetent, irrelevant, and immaterial. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. State whether or not Mr. Mulvane was sent there for the purpose outlined in your answer.

A. He was.

Q. What amounts did you pay to Mr. Mulvane on those trips for the purpose as stated?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and for the reason that the damages are not specially pleaded and because they are not shown to be necessary expenses. The court overruled the objection; to which ruling the defendant at the time excepted.

A. On February 7, 1890, I paid D. W. Mulvane two hundred and forty dollars for expenses incurred by him in a trip to New York to satisfy the purchasers.

Q. Coffin & Stanton?

A. Yes, sir; and Woodbury & Moulton; that I intended to comply with my contract, and was making every effort to do so to satisfy them with reference to the condition.

Q. When was the trade to be carried out with Coffin & Stanton?

A. The tenth day of February, 1890.

Q. And the restraining order was issued when?

A. On the fifth.

Q. And the hearing for a temporary injunction was set down?

A. For the 12th, as I remember it.

Q. Was it necessary for D. W. Mulvane to make another trip to New York for the same or similar purposes?

A. Yes, sir.

Q. When was that made, and what were the expenses of the trip?

A. The subsequent trip; I paid two hundred and eight dollars March 1, 1890, for the second trip.

20 Q. These dates that you have given in connection with the expenses of those trips, are they the first or last payments made?

Counsel for the defendant objected to the question upon the same grounds as recited in the above objection and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. Final payments.

Q. What is the amount that you were prevented from collecting from Coffin & Stanton by reason of the restraining order and temporary injunction?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and because there is no showing that he was prevented from collecting any amount from Coffin & Stanton by the restraining order and for the reason that the question attempts to determine the object and scope of the order of the court. The court sustained the objection; to which ruling of the court the plaintiff at the time excepted.

Q. How much had you received on the contract with Coffin & Stanton?

A. I had received $50,000.00.

Q. And when were you to receive the balance?

A. On the tenth day of February, 1890.

Counsel for the defendant objected to the question as calling
incompetent, irrelevant, and immaterial testimony and objection
any testimony of this witness with reference to the terms of t
written contract, when the written contract is in his possession. T
court overruled the objection; to which ruling of the court the d
fendant excepted at the time.

Counsel for the defendant moved the court to strike out the answ
of the witness because it conflicts with the testimony already intr
duced by the witness.

Mr. LOOMIS: It may be stricken out; we will consent.

Q. After the temporary injunction was dissolved did you carry ou
the contract with Coffin & Stanton?

A. I did.

Q. How much did you receive from them upon the contract a
that time when it was finally carried out?

A. You mean in total in connection with the fifty thousand dol-
lars received when the contract was made?

Q. I don't care about the fifth thousand dollars.

A. Well, the total amount received from Coffin & Stanton and
which was due me on the tenth was $503,333.33.

Q. What was the date you received that amount?

A. Well, various dates after the dissolution of the injunction.

Q. None, however, received until after the injunction was dis-
solved?

A. None except the fifty thousand dollars paid when the contract
was made.

Cross-examination.

Questions by Mr. SMITH:

Q. What connection, if any, had you with the company known as
the Topeka Water Supply Company?

A. I was president and a stockholder.

Q. State what that company was, where it existed, and the amount
of its stock.

Counsel for the plaintiff objected to the question as improper cross-
examination and as calling for incompetent, irrelevant, and immate-
rial testimony. The court overruled the objection; to which ruling
the plaintiff at the time excepted.

A. You mean at what period?

Q. Was it a company here in town?

A. Yes, sir; in the city of Topeka. You mean the original capital
stock or at the time of this controversy?

21 Q. At the time of this controversy.

A. The capital stock was four thousand shares of stock of
one hundred dollars par value each.

Q. You were president of the company?

A. Yes, sir.

Q. Did you enter into a contract with the plaintiffs in this case,

Wescott & Hanson, with reference to the purchase of the capital stock of this company?

A. I entered into a preliminary agreement with them for the sale of this stock, such preliminary agreement to be concluded with a contract which was to be drawn up a few days later.

Q. The contract you refer to, was that the first contract you had with them?

A. That was the only one I had with them.

Q. Before signing the contract you refer to, where you visited by either one of these plaintiffs, and did they leave with you a contract to be executed on their part which you could comply with at any time with reference to the acquirement of the entire stock, capital stock, by you, and turning it over to them?

Counsel for the plaintiff objected to the question as improper cross-examination, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I was visited by both of these parties, separately, however, and one of them did submit a proposition for the purchase, but not a contract, and I never signed it.

Q. Was it in pursuance of this proposition submitted to you by them that you subsequently visited Boston and signed the proposition or contract that you refer to?

A. It was; it succeeded and was a part of the negotiations. My going to Boston was by reason of their having been here and having submitted a proposition of purchase.

Q. At the time you went to Boston, did you own the entire capital stock of the Topeka Water Supply Company?

A. I did not, but I had options on the purchase of it.

Q. How much of the capital stock of the water company did you own?

A. Well, I can't answer that question definitely. I owned about fifty-six thousand dollars, perhaps fifty-seven thousand dollars or nearly sixty thousand dollars, myself and children, and then I acquired or had options for the purchase of nearly all of the stock when I went to Boston.

Q. Then you did not close those options?

A. No, sir.

Q. I would like to read you a contract set forth in the record and see if that is the contract you mention that you executed in Boston:

"BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of par value of one hundred dollars per share, for the sum of five hundred thousand dollars, on the following terms of payment, namely, the sum of sixty thousand dollars to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration in said contract to be four hundred and forty thousand dollars, to be paid as follows: the sum of two hun-

dred thousand dollars to be paid February 10, 1890; one hundre
and forty thousand dollars to be paid February 20, 1890, and on
hundred thousand dollars to be paid March 20, 1890; provided tha
final payment of the last-named sum of one hundred thousand dollar
may be paid on February 20, 1890, if said Wescott & Hanson ma
elect so to do, by giving me five days' notice of such intention; pay
ment to be made for and delivery of said stock to be made a
22 the National Bank of North America, in the city of Boston
Massachusetts.

JOAB MULVANE."

Directed to George P. Wescott and Samuel Hanson.

"We hereby accept your offer to sell the entire capital stock of th
Topeka Water Supply Company for the price and on the terms an
conditions above stated.

GEORGE P. WESCOTT.
SAMUEL HANSON."

Q. Is that the paper?

A. Let me see that, please. I think this is the preliminary propo
sition first made in conversation with these gentlemen who wer
present with me in a room in the hotel in Boston, and as this con
versation transpired one of these gentlemen jotted it down substan
tially and turned to me and said, "Is this your proposition?"

Q. Well, I don't care anything about that.

A. I propose to tell all about it.

Q. (The question was read to the witness.)

A. You use the word contract, but I don't think any such wor
was connected with it at all. That that is substantially the proposi
tion, I believe to be correct, that I made and signed.

Q. What day of the week was that?

A. The 14th day of December.

Q. What day of the week?

A. It was Saturday, I think.

Q. Did you subsequently enter into another contract with Coffi
& Stanton?

A. I did.

Q. How long after that, the date of this paper?

Counsel for the plaintiff objected to the question as improper cross
examination, as calling for that which is not the best evidence, an
as asking for incompetent, irrelevant, and immaterial testimony
the court overruled the objection; to which ruling the plaintiff a
the time excepted.

A. You mean the subsequent sale made to Coffin & Stanton?

Q. Yes.

A. The sale was made on the 18th day of December, 1889.

Q. Have you a copy of the contract there?

A. I have it.

Q. Will you let me see it?

A. (The paper is handed to counsel.)

Q. This is the contract subsequently entered into between you and Coffin & Stanton, is it?

A. That is the contract of sale to Coffin & Stanton and Woodbury & Moulton.

Mr. SMITH: I offer this in evidence in connection with the cross-examination of this witness.

The paper referred to was read to the court and jury and is in words and figures as follows, to wit:

"This agreement entered into this the eighteenth day of December eighteen hundred and eighty-nine, between Joab Mulvane of Topeka, Kansas, party of the first part, and Coffin & Stanton of New York city and Woodbury & Moulton of Portland, Maine, party of the second part witnesseth: That in consideration of fifty thousand ($50,000.00) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thousand ($50,000.00) — being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six per cent. (6 %) per annum from January first, eighteen hundred and ninety, by said party of the second part, the party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka, Water Supply Company of Topeka, Kansas, and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company and the organization of and issuance of stock and bonds by a new company if desired, said plan to be formulated by the party of the second part.

Said stock and bonds so issued to be delivered to the party
23 of the second part by the party of the first part, upon receipt of said purchase price, viz., five hundred and fifty thousand dollars, all expense of such issuance of stock and bonds to be borne by the party of the second part. It being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company, on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall be paid out of said revenue.

It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000.00) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then in that event the party of the first part hereby agrees to give the party of the second

part a reasonable extension of time to make such payment of five hundred thousand ($500,000.00) dollars.

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Executed in triplicate.
New York city, December 18th, 1889."

Q. After executing the contract which I have just read did you come back to Topeka and organize the new company known as the Topeka Water Company?

A. Yes, sir.

Q. Who was president of that company?

A. I was.

Q. When was that company organized?

A. My recollection is, in January, 1890.

Q. That was the company organized in pursuance of the terms of this contract which I have just read?

A. Yes, sir.

Q. For the purpose of transferring the property?

A. Yes, sir.

Q. To convey the property of which you negotiated the sale?

A. Yes, sir.

Q. And you were elected president of that company?

A. Yes, sir.

Q. What steps were taken by you as president to carry out the terms of this contract?

A. I secured the re-enactment of the old contract to the Topeka Water Supply Company to the Topeka Water Company and all necessary arrangements with the city to end all the rights of the old company by giving to the new, filing charter and everything with the State.

Q. Did the old company, the Topeka Water Supply Company, execute a deed of conveyance to the Topeka Water Company?

A. That is my recollection.

Q. Did the new company also execute bonds?

A. Yes, sir.

Q. What was the amount of that issue; do you remember?

A. Why, the amount provided for was $1,500,000 is my recollection.

Q. The new company went into possession of the property of the old company?

A. At what time?

Q. Along about the first of January.

A. No; I think it was not perfected. I think the arrangement with the city was not perfected until towards the last of January.

Q. The new company was in possession prior to the bringing of this injunction suit?

A. Well, I was in possession.

Q. Well, you were president of the new company, were you not?

A. I had acquired, through option of purchase, all of the stock

and really was running the business, and I think under the old organizantion, I am not sure whether up to the first of February or just when, the accounts were changed. I don't recollect as to that.

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Q. Don't you know that you, as president of the new company, had signed a large number of bonds upon this plant, and that the deed had been recorded, and this new mortgage was recorded some time prior to bringing this injunction suit?

A. I can't say as to dates.

Q. Well, you were in possession of that work personally as Joab Mulvane *of the water works*?

A. No, sir; we run it under the old corporation, but I practically owned it.

Q. You were president of the new corporation that was in possession of it?

A. Yes, sir; but the new corporation was mine until I got my pay for the stock.

Q. Well, that is a question.

A. Well, the contract so stipulates. It was all mine until I got my money.

Q. You treated the new corporation as yours and the old corporation as yours individually?

A. I did not say individually.

Q. You say it was all yours; how was it yours, then? You don't mean it was yours, do you? Don't you mean it belonged to the Topeka Water Company, a corporation; was not that the legal owner of it?

A. I will not say that. I acquired the entire moneyed interest of both corporations and necessarily had to do so before I could convey that to — purchasers, Collin & Stanton and Woodbury & Moulton.

Q. You don't mean to say there was any deed to you individually?

A. No, sir; it was all deeded to the corporation.

Q. The corporation owned the property?

A. You can consider that as you like. As a matter of fact, I owned the corporation and everything relating to it, but was running business as corporations.

Q. Then along in February this suit was brought against you?

A. This restraining order was served the fifth of February, as I remember it.

Q. They served you with process there?

A. I was served with the usual papers of court.

Q. As Joab Mulvane, and then you were served as Joab Mulvane as president of the Topeka Water Supply Company and as president of the Topeka Water Company, both, were you not?

Counsel for the plaintiff objected to the question as calling for that which is not the best evidence and for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I don't remember as to the details, but I presume I was served in every sort of way. I don't recollect whether there was any service

on me individually outside of being president of each of the companies, but I presume I was; I don't remember.

Q. What was the first thing you did after being served with process in this case?

A. About the first thing I did was to look up some lawyers. I needed a lawyer, and I went after him.

Q. Who did you first employ?

A. I think McFarland.

Q. What did you say to him when you called him?

A. O, I can't tell you. I don't remember what was said.

Q. What did you employ him for? You told him you had been sued, didn't you?

A. I showed the papers to him and told him I wanted him to serve me in this case. He was a lawyer, and I assumed that he would know what it meant.

Q. Had he been the lawyer of the Topeka Water Supply Company a long while before that?

A. Not in a regular way.

Q. Well, in an irregular way?

A. I am not sure.

Q. Didn't he represent the Topeka Water Supply Company in all of its important litigations for several years?

25 A. No, sir; I think not; so far as having a regular lawyer was concerned, I think Mr. Milton Case was so regarded, but we had none on a salary.

Q. Whenever you had any litigation that amounted to anything you employed Jim McFarland, didn't you?

A. No, sir; we employed the honorable judge here once in connection with Mr. Case.

Q. Mr. McFarland was counsel of the company in its litigation with Potwin?

A. I think he was in that case; I don't remember any other case he was in.

Q. You naturally went to him because he had represented the company before?

A. No, sir; I did not go for that reason at all.

Q. Why did you?

A. Because I knew he was a good lawyer. But he was not the lawyer of the corporation; we had no lawyer unless it was Mr. Milton Case; the superintendent of the company asked him questions; he was a member of the board, and I think in current matters Mr. Case was regarded as counsel of the company.

Q. You went to McFarland and turned over the papers?

A. That is my recollection.

Q. And told him to take charge of it?

A. Well, I employed him, but not to the exclusion of anybody else.

Q. You employed him as president of the Topeka Water Company?

A. No, sir.

Q. As president of the Topeka Water Supply Company?

A. No, sir; I don't think there was any reference made to the company at all.

Q. You turned over all the papers that were served upon you and told him to go ahead and take charge of the suit?

A. I can't tell you what was said, but I employed him to represent me in the matter; as to the details of the conversation, I can't tell you at this time.

Q. Did you have any talk with him at *a* that time about his compensation?

A. No, sir.

Q. Just went and employed him as you would any *other* lawyer?

A. I regarded him as an able man.

Q. At that time you did not know how extensive the litigation would be?

A. No, sir.

Q. Nor what he would be required to do?

A. No, sir.

Q. Who next did you employ?

A. I am not sure whether Hurd & Dunlap first, but I employed Hurd and Dunlap and Hagan and McFarland early, very early, in the matter.

Q. All the same way?

A. Yes, sir; went to them personally.

Q. Did not have any contract with them?

A. No, sir.

Q. Just told them to go ahead and represent the defendants in the case?

A. I just employed them to go ahead and meet whatever the case presented.

Q. They subsequently appeared for you, didn't they?

A. Yes, sir.

Q. And for the Topeka Water Company and for the Topeka Water Supply Company?

A. Yes, sir; I think they are of record in that way.

Q. Then there was another defendant in the case, Coffin & Stanton?

A. Yes, sir; Coffin and Stanton and Woodbury and Moulton.

Q. Did you employ anybody to represent them?

A. Well, not directly, and yet I can't say that I did directly.

Q. There was no contract made with any of these counsel at the time you employed them?

A. Not by me.

Q. As to what they should do or the amount they should be paid?

A. No, sir; I assumed they knew what to do; that is what I employed them for.

Q. Just employed them generally to represent you in the case?

A. Yes, sir.

Q. And the companies you represented?

26 A. No, sir; there was nothing said about the companies that I know of.

Q. Didn't you consider these companies the same as yourself?

A. Yes, sir; the companies were myself, and I was the companies

as far as accomplishing the result of being relieved from the restraining order. I was the party that was aimed at, and the companies were simply attacked indirectly to get at me.

Q. And you authorized counsel to appear for those companies, didn't you?

A. In whatever way was necessary.

Q. If they did appear, of course it was in pursuance of your retaining them to represent the company, wasn't it?

A. I think they are of record as representing both me and the companies, *but they never were paid by the company.*

Q. Now, you had Hagan and Hurd & Dunlap and McFarland, and you still thought you needed additional counsel?

A. I made up my mind I did.

Q. Why?

A. I felt that my fortune was at stake—my reputation was at stake. I was attacked for violation of a contract. I was accused of wanting to escape from the obligations of a contract, and was charged that because I got more money I was wanting to violate a contract. I felt it was necessary, absolutely, to succeed from every standpoint; that my fortune, my reputation, was at stake in the matter, and I did not propose to fail for lack of counsel.

Q. What fortune was there at stake in the matter?

A. Well——

Q. There was nothing more than fifty thousand dollars involved, was there?

A. Yes, sir.

Q. Was not the difference between those two parties just fifty thousand dollars, and didn't you agree to sell to Wescott & Hanson for five hundred thousand dollars, and finally two days afterwards went over to New York and made a contract to sell to Coffin & Stanton and Woodbury & Moulton for fifty thousand dollars in advance? It was to enforce this first contract that suit was brought. How does that involve your whole fortune?

A. The suit was brought to enforce what was claimed to be the first contract. Now, it involved my fortune in this way: I was obliged to buy the entire stock of the water company to enable me to comply with my contract. I was obliged to own the whole thing. I had fifty thousand dollars of Coffin & Stanton's money which they could have demanded if I had failed to comply with my contract. I was obliged to go into the bank and borrow money—twenty-seven thousand dollars—and give my notes and carry the whole thing.

Q. You say you had to buy all this property. You had bought that before, hadn't you?

A. I had bought a large amount of it before I went.

Q. You owned it at the time you entered into this contract with Coffin & Stanton, didn't you?

A. I owned it in my own right. I had bought some of it and paid for it. I had given my notes for a large amount, and I had options for all of it. So it became necessary for me to close at once and either pay the money at once or give my obligations to pay for the stock or assume liability for the stock.

Q. How much did you pay for the stock on an average?

A. I paid par for every dollar of it.

Q. How much did you get from Coffin & Stanton in addition to par?

A. I paid $400,000 and considerable interest. I got from Coffin & Stanton——

Q. 550,000, wasn't it?

A. Yes, sir; more than that. I got $550,000 and the interest that was due me from the first of January up to the tenth of February, *which I was entitled to by reason of their getting* the earnings of the plant; $503,333.33 in addition to the fifty thousand dollars they had paid originally.

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Q. If Wescott & Hanson had made you carry out what they considered their contract, you would have only made $100,000 instead of $150,000? There was only $50,000 difference between these two contracts. Your fortune was a great deal more than $50,000 at that time, wasn't it?

A. My fortune was more than $50,000.

Q. Yes.

A. I was worth more than that at that time.

Q. Yes.

A. Yes, sir; I was.

Q. Now, going back to where you started from, didn't you consider Mr. McFarland capable of managing this matter when you retained him?

A. I considered him a capable lawyer, but I did not consider him or any other one lawyer equal to the emergency. Time was a very important element to me.

Q. There was no great emergency?

A. Yes, sir.

Q. All you had to do, as it turned out, was to go into court and suggest that there was an undisclosed principal by the name of Woodbury & Moulton who participated in this contract that you made with Coffin & Stanton, and as soon as the court's attention was called to that fact, by reason of Woodbury & Moulton being citizens of the same State with one of the plaintiffs—that is, of the same State with Mr. Wescott—of course, the Federal court understood it did not have jurisdiction and dissolved the injunction? That was all there was to it, wasn't there?

Counsel for the plaintiff objected to the question as asking for the legal conclusion of the witness, as improper cross-examination, and as calling for that which is not the best evidence and for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. No, sir; there was a great deal more to it. I could not hold Coffin & Stanton and Woodbury & Moulton as purchasers one single day after the 10th of February, except at their pleasure.

Q. I will call your attention to the terms of this contract just read in regard to further time.

A. That only applied to them. I had no further time; that did not apply to me at all; in that respect I was limited.

Q. After you employed McFarland, then, you went and employed Hagan, was it?

A. I don't know in which order—Hurd and Dunlap and Hagan and A. L. Williams.

Q. Why did you employ Hurd & Dunlap?

A. Because they were eminent lawyers, and I felt I needed counsel, and the case was a delicate one, and one in which I needed to reach a dissolution of the injunction at the earliest possible moment. I could not afford any mistake.

Q. You wanted to beat that suit, didn't you, as well as dissolve the injunction?

A. Well, they went together.

Q. You considered Hurd & Dunlap a good firm?

A. Yes, sir.

Q. A strong firm?

A. Yes, sir.

Q. And employed them because they were able lawyers?

A. Yes, sir.

Q. Why were you not satisfied with Hurd & Dunlap and McFarland? Why did you need anybody else?

A. I found that lawyers are lawyers, ready to advise additional counsel, and they never feel sure of anything.

Q. Are they where it requires a division of the fees?

A. I don't know about that.

Q. Well, who next did you employ?

A. I can't tell the order. The last man I employed was Mr. Williams.

28 Q. Why did you employ Mr. Hagan?

A. Because I felt he would be valuable in the case.

Q. After you got all these eminent counsel, Mr. Hagan, Hurd & Dunlap, and McFarland, then you were not satisfied even then, but went to Mr. Williams, did you?

A. Yes, sir.

Q. What time did you employ Mr. Williams, with reference to the proceedings instituted?

A. I think I can't tell you the date, but Mr. Williams was employed, I think, on or about the time of the hearing before Judge Foster.

Q. You employed him the same as you did the rest of these lawyers?

A. I employed him to represent me in the case.

Q. To represent you and the water companies?

A. Whatever was necessary to my interests in the case.

Q. No contract made with reference to fees?

A. No, sir.

Q. You paid these bills as they were presented?

A. Well, I think that even higher bills were asked, and I protested.

Q. You did not protest against Mr. Williams' bill, did you?
A. No, sir.
Q. Or McFarland's bill?
A. I think not.
Q. Or Hurd & Dunlap's bill?
A. I think there was only one instance in which I protested.
Q. When did you take these receipts you have offered in evidence—the receipt from McFarland; when was that taken?
A. At the time of the payments.
Q. Was that receipt in existence at the time of the former trial of this case?
A. Yes, sir.
Q. Was that receipt given to you at the time the payment was made?
A. Yes, sir.
Q. Did you ask him for a receipt?
A. I don't remember as to that.
Q. Did you ask him what the receipt should show?
A. I don't remember that I did.
Q. None of these payments were made by you until some time after Judge Caldwell had dissolved the injunction?
A. Well, very soon after; almost immediately afterwards. The injunction was dissolved the fourth or fifth of April, and the last payment was made, I think, in May and the others in April.
Q. But they were all made after the injunction was dissolved?
A. Yes, sir.
Q. After you thought you had fixed a liability on Wescott & Hanson on their injunction bond?
A. I don't know as I had any thought about it. I intended to fix them for all I could rightfully.
Q. And was very liberal in the payment of these bills on that account?
A. No, sir.
Q. Why not?
A. Because I had no assurance in paying out the money then or of getting it at the end of a lawsuit.
Q. You felt perfectly confident, didn't you?
A. I don't know as I did.
Q. Didn't these counsel all say that you would have no trouble in getting this money back again?
A. I can't say that matter was discussed.
Q. Wasn't you advised that there was a liability against Wescott & Hanson on the injunction bond?
A. No, sir. If you wish to impress the jury on the line that there was fixed up a job, there was no such talk.
Q. Well, you fixed up a pretty good job, didn't you?
A. The business was honorable, so far as I know. I don't know what attorneys fairly ought to charge for their services. I am not an expert in that line.
Q. You say you paid $70,00 for telegrams?
A. Yes, sir; I think more than that.

Q. Who did you telegraph to?

29 A. The telegrams will show for themselves. I have them all, I think.

Q. I wish you would produce them.

A. Telegraphing to New York and back and forth and to Portland, Maine.

Q. You paid seventy dollars for telegraphing and had to send your son down there twice on this same business?

A. Yes, sir.

Q. What is the use of telegraphing if he was there?

A. The telegrams are very brief.

Q. I would like to see those telegrams, all of them.

A. Well, I think I can find them.

NOON.

Court adjourned to one thirty p. m. Thursday, June 16th, 1898.

1.30 P. M.

Court met pursuant to adjournment, and the trial proceeded as follows:

JOAB MULVANE, the plaintiff, recalled to the witness stand, testified as follows:

Cross-examination resumed.

Questions by Mr. SMITH:

Q. You said that you had telegrams which covered this $70 of disbursements for messages to New York and other places in reference to this injunction. Have you got those telegrams with you?

A. I have not got the telegrams. I have the memoranda and date upon which the account is made up.

Q. Why didn't you produce the actual telegrams?

A. Many of them were sent from different points, and I did not keep copies of them.

Q. Why didn't you produce those that you have got?

A. Well, it would be very difficult to find those. I presume I have not got all of them.

Q. Didn't you state that you had them?

A. I might have so stated, and as a general proposition I presume I could gather up most of them; but what I meant by my answer was that I had a careful account and data to show how that account was made up.

Q. What I wanted was the telegrams themselves to show whether they had connection with this matter or not.

A. Well, I can't do that.

Q. I have no doubt that you paid out $70, but I want to know what you paid it out for. You said you paid D. W. Mulvane, your son, some money to go to New York?

A. Yes, sir.

Q. How much was that?

A. It was in two separate items for two different trips.

Q. When was the first trip made?

A. March 1, 1890.

Q. How much was that?

A. $208.00.

Q. What did that cover?

A. Well, I have a bill here which was made out and which will speak for itself. Here is the bill.

Q. He charges *per diem* there for services, did he?

A. It is just as the bill states.

Q. Did you employ him as counsel to go there as attorney?

A. I employed him to go there to do things I asked him to do.

Q. That did not have any bearing upon the motion to dissolve the injunction, did it?

A. It was an expense entailed upon me by reason of the injunction.

Q. Wasn't it by reason of the suit being brought, not the injunction itself?

A. By reason of the injunction which prevented me from meeting these parties and complying with my contract.

Q. What necessity was there for sending a man there personally when you could just as well telegraph the facts to the parties you were dealing with that suit had been brought and you had been enjoined and as soon as you got rid of this injunction you would fulfill your contract? What was the necessity of sending your son there with reference to dissolving the injunction; if you sent your son there to negotiate generally to settle this lawsuit that is not a competent expense?

A. I don't understand you.

30 Q. If you sent your son there to explain why this suit was brought or to work up a general defense, that is not a proper expense.

A. If there had been no injunction, I would not need to send him. I would have been there myself with the stock and bonds to turn over and get my money, but the injunction made it necessary in order to hold these parties.

Q. You think it was necessary?

A. I deemed it absolutely necessary. These parties told me they had sold a large amount of the bonds and they expected delivery of them on the tenth day of February.

Q. Those were the bonds of the new company?

A. Yes, sir.

Q. Well, was it to explain why those bonds were not delivered that you sent your son there?

A. By reason of this injunction; yes, sir.

Q. That was the great drawback that occurred at that time, was that, and the fact that the Topeka Water Company could not deliver its bonds?

A. I could not deliver the stock. I had all of the stock endorsed to me in blank and the entire property. I also had these bonds, which had been forwarded to me to execute, and it was necessary

to turn over to them the stock and the bonds, and I was enjoine from doing it.

Q. You were enjoined from executing these bonds of the Topek Water Company?

A. I had them practically executed.

Q. You were enjoined from delivering them?

A. Yes, sir.

Q. And to show why those were not delivered you sent your so on?

A. That was in part a reason, as I have stated.

Q. Why was it necessary to send him twice?

A. The hearing for a temporary injunction was not favorable, an these parties were very anxious and very solicitous, both writing an wiring me, stating the necessity of having the bonds in order to plac them and to have the stock to have the transaction closed. Th same necessity existed for the second trip that existed for the first.

Q. There was no other explanation except the one that he mad the first time?

A. Well, I tried to explain the whole matter. The injunction re strained me from complying with my contract of sale to these parties They had a right to the property.

Q. It restrained you and the two water companies and Coffin & Stanton, too?

A. That is my understanding; yes, sir.

Q. Then you thought it necessary again to send your son to ex plain why the new company did not issue the new bonds and sen them on so Coffin & Stanton could comply with their propositio and dispose of the new bonds?

A. It is just as I have stated.

Q. Haven't you said that?

A. I think I have said more than that. They were entitled to th stock, as well as the bonds, as part of my contract. They had se them to be executed, and I had executed them.

Q. With reference to employing all these attorneys, it was with view to settling this whole controversy, wasn't it, so you could de liver the new bonds of the company, so that Coffin & Stanton coul comply with their contract and settle the whole thing? You wante to get rid of this lawsuit was the reason why you employed these a torneys, wasn't it?

A. It was to enable me to comply with my contract. That wa the object of my employing attorneys.

Q. With that purpose in view these counsel went in and repre sented all the defendants in that suit?

A. I never employed them to represent any one but myself. An other representation was incidental.

Q. Well, you were president of the two companies?

A. Yes, sir.

Q. And you said before when these papers were served o
31 you, you took them over to Mr. McFarland and gave them t him and told him to go in and defend the case, or in sub stance that?

A. I acquainted him with the suit.

Q. And you ratified everything done by these various counsel—things done for you individually and things done for Coffin & Stanton and things done for the Topeka Water Company and for the Topeka Water Supply Company, both of which companies you were president of?

A. I left it to the wisdom of my counsel to determine what to do.

Q. When you paid these bills you got a full release from them for all the services rendered by them in the case?

A. I never got any receipt -or any services rendered for anybody but myself.

Q. That was the understanding between you and them; they were not to charge the water companies anything?

A. No understanding about it. I employed them to take care of my case.

Q. Your case was the whole case, wasn't it?

A. Well, I held all the stock of both companies; it was transferred to me in blank. I held it all; controlled the whole situation.

Q. You remained president of the Topeka Water Company quite a while after that, didn't you?

A. Yes, sir.

Q. No claim was made against that company by any of these attorneys, was there?

A. No, sir; not that I know of.

Q. You would have known it if there had been?

A. I should think so.

Q. You understood, didn't you, that when you paid these counsel that money it was in satisfaction of all services rendered by them in the case?

A. Yes, sir; as far as I was concerned.

Q. As far as everybody was concerned, wasn't it?

A. Well, I don't know what anybody may have done outside of me. So far as I represented the situation here, I know of no other bills.

Q. You represented the two companies here, didn't you?

A. Well, necessarily they centered in me.

Q. What I am getting at is: These bills covered all the services rendered by the counsel in the case?

A. I don't know of any other services or any other bills made.

Q. Well, you knew that is a fact, didn't you, when you paid these men this large sum of money it paid them in full for everything they had done in the case?

A. I don't know of any other bills or any other charges.

Q. Why did you pay Hurd & Dunlap just as much as you did the other gentlemen for the same services?

A. I paid them the charge they made.

Q. So you paid anybody the charge they made, whatever it may have been?

A. No, sir; I did not.

Q. Well, with one exception. What is the reason you did not get

your money from Coffin & Stanton and Woodbury & Moulton i
mediately upon the injunction being dissolved?

A. I can only state what they stated to me. They claimed to
that they had made sales sufficient and had funds sufficient to h
paid me in full on the tenth day of February, but that parties h
cancelled their orders for bonds subsequent to that, pending the
junction, and that they must have some time in which to make th
payments after the matter was finally settled, after the injunct
was dissolved, and I gave them time and got it — payments alo
different times. It run several months before I got it entirely.

Q. By these bonds you mean the bonds of the new company?

A. Yes, sir; I suppose so. That was their statement to me.

Q. That was your own understanding?

A. I assumed that was it.

32 Q. What was the earnings of the company from the fi
day of January up to the time they finally turned over t
property to Coffin & Stanton?

A. Of the year 1890?

Q. Yes.

A. Well, I don't know what they were. I think they were in e
cess of the interest on the amount which they paid me or were
pay me. I don't remember, but I presume they were. Those p
ments came semi-annually, and the first of January there would
a large amount.

Q. It was in excess of the interest on the deferred payments y
had?

A. I think probably it would be a little over.

Q. This company at that time was earning more than enough
pay interest on five or six hundred thousand dollars' earning—no
mean?

A. Well, in a sense the company was. The facts were that
earnings were taken as fast as they were made over and above p
ing interest on one hundred and twenty thousand dollars of inde
edness. All the other earnings were continually put into extensio
At the time I sold the works the city was demanding extensions t
would have cost us forty-five or fifty thousand dollars. So the ea
ings of the company were not paid to the stockholders; divide
were not being made.

Q. What became of that fund? If it did not belong to the sto
holders, who did it belong to?

A. I don't understand.

Q. The earnings of the company.

A. During what period?

Q. From the first of January up to the time that the property w
turned over to Coffin & Stanton.

A. Coffin & Stanton, under the contract, were to receive the ea
ings from the first of January.

Q. They had not any contract with the new company, howev

A. Oh, no, sir; not as to that.

Q. That was a separate matter?

A. It was a matter between themselves and me. That was p

of the sale. They were to pay me interest on the $500,000, and they were to receive from January first up to February tenth the earnings of the business, or I was to account to them. The earnings went in. They did not receive anything, as a matter of fact, until they got possession of the property.

Q. When they did get possession they got all the earnings?

A. Yes, sir; everything was account- for to them.

Redirect examination.

Questions by Mr. LOOMIS:

Q. What did the interest amount to that you got of Coffin & Stanton?

A. The interest I was to receive from them on the tenth of February is what you mean?

Q. Yes.

A. $3,333.33 is my recollection.

Q. That was paid you at the time you settled with them in addition to the $500,000?

A. Yes, sir. After the injunction was dissolved they owed me on the tenth of February $503,333.33.

Q. Now, you say, in answer to Mr. Smith's question, that you employed these attorneys to represent you, and that in representing others they did so by virtue of your employment and represented the others incidentally. What do you mean by that?

A. I mean I employed them for myself, to do whatever would be necessary in the matter, and I did not employ them for anybody else.

Q. And in representing the others incidentally, do you mean by that that it was for the purpose of protecting your interests?

A. Solely; yes, sir.

Q. Were any of the attorneys other than Mr. Williams employed to represent you on the merits of the case?

A. No, sir.

Q. Did they appear in the case after the disposition of the injunction?

A. No, sir; not to my knowledge.

Q. Did they charge you for any services after the temporary
33 injunction was dissolved or for anything other than services connected with the injunction?

A. No, sir; the amounts paid them was solely for the injunction.

Q. So far as you know, did they make any charge against the other defendants for representing the other defendants in the case?

A. Not that I know of.

Q. So far as you know, did these other defendants pay these attorneys you employed for representing them in the case in any phase of it?

A. No, sir; I think not.

Q. Now, Mr. Mulvane, you spoke about being bankrupt or ruined if this temporary injunction had not been dissolved in a short time

after it was granted. I wish you would state what, if any, obligations you incurred in transferring these options into actual purchases of stock after the restraining order was issued.

A. I assumed obligations by reason of this transaction in the amount of three hundred and forty thousand dollars. I borrowed of the banks twenty-seven thousand dollars. I gave my notes to various persons for the purchase of stock or had my notes out for two hundred and sixty-three thousand or thereabouts. I had received from Coffin & Stanton fifty thousand, so that I had in this business and was liable for three hundred and forty thousand dollars.

Q. And these obligations were incurred for what purpose?

A. For the purpose of carrying out my contract with Coffin & Stanton and turning over to them the property—the stock.

Q. Well, they were incurred for the purpose of enabling you to get possession of the stock so you could comply with the contract?

A. Yes, sir.

Q. Now, Mr. Mulvane, I wish you would state to the jury whether or not you would have been able to meet those outstanding obligations if the injunction had been continued in force, say, until the next term of court.

A. I don't see how I could. I think I could not.

Q. How were those obligations secured; what evidence did you give of those obligations that you assumed?

A. Notes for a short time.

Q. How long did they run?

A. Thirty, sixty, and ninety days; mostly short periods. I think perhaps I had one or two as long as six months.

Q. What did you say the total amount of these obligations were?

A. $340,000; that is not including the $50,000 which I had of Coffin & Stanton, which I was liable to be called upon to return them if I failed to comply with my contract, and was also liable to suit for damages.

Q. What did you have to meet these obligations in the event of being unable to collect the money due you from Coffin & Stanton and Woodbury & Moulton?

A. Well, I had no ready means; I had some property.

Q. Was it valuable enough to meet these obligations?

A. No, sir; it would not have been.

Q. To what extent could you have met these obligations by other property which you had then at that time?

A. Well, that is hard to answer, but I think it would have been impossible to meet the emergency.

Q. Then if this temporary injunction had not been dissolved you would have found it impossible to meet your outstanding obligations?

A. That was the feeling I had about it. I felt so, and I am quite sure and satisfied that I could not have done it.

Q. Is that what you meant when you said you would have been ruined if the temporary injunction had not been dissolved?

A. Yes, sir.

34 Q. Now, what assurance, if any, did you have that Wescott & Hanson were financially able to carry out any judgment which the court might have rendered specifically enforcing the contract which they claimed to have had with you upon the theory that the court had entered judgment or decree of that kind?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff excepted at the time.

Q. At the time you entered into this preliminary contract with Wescott & Hanson, in Boston, on December 14, 1890, and afterwards met on the following Monday for the purpose of drawing up formal contract, as you have already testified in answer to questions submitted by Mr. Smith, state whether or not Wescott & Hanson were prepared or were willing to pay you sixty thousand dollars called for in that contract.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. They were not prepared. They utterly refused to pay the sixty thousand dollars.

Q. After the temporary injunction was dissolved, did you, as a matter of fact, turn over all the capital stock of the Topeka Water Company and Topeka Water Supply Company to Coffin & Stanton in accordance with your contract with them?

A. I did.

Q. That delivery was made to them about what time?

A. Well, in April, immediately after the injunction was dissolved. I can't give you the date now without looking up the records.

Q. What assurance did you have from Coffin & Stanton and Woodbury & Moulton that they would not sue you for damages in the event that the contract with them had been permanently enjoined?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. Did you, as a matter of fact, employ any of these attorneys for the purpose of representing either of these water companies?

A. I did not.

Q. You said in answer to a question propounded by Mr. Smith that you wanted to defend the suit generally. Who did you employ for the purpose of representing you on the merits of the case, for the purpose of defending the suit generally?

A. Mr. A. L. Williams.

Q. Was he the only one?

A. Yes, sir; on the merits of the case generally. The employment

of all the other attorneys except Mr. Williams was in the preliminary or in the matter involved in the injunction, and when that was accomplished I employed Mr. Williams, as the suit was retained, a suit for damages against me on the part of the plaintiffs. I employed Mr. Williams to go on with the suit as to its merits, and he is the only one.

Q. If an injunction had not been sought or obtained in the case, was there anything in the case generally, outside of the injunction, that would have prevented you from carrying out your agreement with Coffin & Stanton and Woodbury & Moulton? Would the pendency of the suit itself, without the injunction feature, have prevented you from carrying out this contract in any way?

A. There was nothing that I knew of but the injunction.

Q. You did finally carry it out while the suit was pending on the merits?

A. Yes, sir; I was prepared to carry it out on the tenth day of February, before the injunction was dissolved. I was prepared, I think, as early as in January, but was waiting for the time.

35 Q. When you made the contract with Wescott & Hanson in Boston, December 14th, 1889, did you own all the capital stock of the Topeka Water Supply Company?

A. No; I did not. There was some of the stock that I did not succeed in getting transferred to me in blank.

Q. Did you have options on a large portion of it?

A. Yes, sir; I think all but about one hundred and twenty shares.

Q. And that you never owned, only had options upon?

A. No, sir.

Q. But you secured it all in time to comply with your contract with Coffin & Stanton?

A. Yes, sir; I secured the final amount, I think, in the early part of January.

Q. When Wescott & Hanson refused to pay the $60,000 in accordance with the agreement of December 14th, what did you do with reference to declaring the trade off?

A. I declared it off on the basis that they refused to pay me the money and asked things that I did not care to do. In the preliminary agreement they asked me to deliver the stock which I did not have and which they fully understood I did not have.

Q. You spoke about D. W. Mulvane's trip to New York being on March 1st. Please look that up and see if the first trip was not made on February 7th.

A. Well, the payment was made on March first, I think.

Q. When was the payment for the first trip made?

A. The payment was made March first, 1890.

Q. When was the other payment made?

A. The first payment was made February 7, 1890.

Q. The first trip was made after the restraining order was issued?

A. Yes, sir.

Q. And before the temporary injunctions?
A. Yes, sir.
Q. And the next trip was made after the temporary injunction was granted?
A. Yes, sir.

Recross-examination.

Questions by Mr. SMITH:

Q. Were not Wescott & Hanson seeking to enforce this contract that they made with you? Was not that the object of this suit that was brought?
A. That was what it purported to be.
Q. They tendered performance on their part of the contract, and didn't they, when they found they could not give bond here on account of the friendly interests of the bankers of this town with your brother—didn't they come forward and place $75,000 in the clerk's hands?
A. The records show what they did.
Q. Well, is not that true?
A. I understood they did.
Q. You saw it put up in court, didn't you?
A. I saw the money handled there; I did not count it; I supposed that was it.
Q. Then, even if the injunction had been made permanent and you had been compelled to comply with this contract, you would not have been ruined, would you? You would have got five hundred thousand and made a profit of one hundred thousand out of this transaction, wouldn't it?
A. I had reason to think they could not comply with that contract and would not. They were trying to hold me up.
Q. Did you have reason to think that after they brought into court $75,000 in cash and put it up?
A. That was done by the Maverick bank, Mr. Potter, and not by them.
Q. Were you not tendered by them through myself as their attorney a contract and asked you to comply with it?
A. I think you tendered me some paper which I did not examine at all.
Q. You understood it to be the contract?
A. You said something as to what it was, but I did not examine it.
Q. Well, I don't see how you could be ruined by being compelled to comply with this contract and receive $500,000. Even by
36 that you would make $100,000.
A. I was liable to be sued any day after the tenth of February by Coffin & Stanton for damages in a large amount and to return them the $50,000, and I had not any assurance in the world that Wescott & Hanson would comply with their contract. On the contrary, everything indicated that they would not do it, for

they refused to do it in Boston, and I had a right to assume they could not get the money.

Q. Did they not tender you a certified check for $60,000 at that time?

A. No, sir, they did not; they claimed they could get one, but they did not tender me anything.

Q. Didn't you arbitrarily turn them back and refuse to sign the contract, simply because you had got an offer of $50,000 more the night before?

A. No, sir; I spent a half a day with them trying to contract with them, and very reluctantly turned them down because they would not pay a dollar. They tried to get me into a contract which they knew I could not comply with.

Q. Hadn't you at that time an offer from Coffin & Stanton to pay an advance of $50,000 at the time you were in Boston, before you left there?

A. No, sir.

Q. Didn't you have a proposition from Coffin & Stanton to pay $550,000 for the entire capital stock of this plant before you left Boston?

A. No, sir.

Q. When did you get it?

A. I got it in New York city on the 18th day of December.

Q. Well, didn't you have a proposition from them to come to New York, that they would pay an advance?

A. No, sir.

Q. Didn't you get a telegram from them?

A. I may have got a telegram, but I had no proposition.

Q. Why did you go there then?

A. I went over there because they wanted an opportunity to buy the property.

Q. You went over there and in twenty-four hours closed a contract with them?

A. I closed it as soon as I felt I could.

Q. But inside of twenty-four hours after you got there?

A. Yes, sir; I think it was.

Q. Then I don't see how you would have been ruined if you had been compelled to comply with this contract.

A. They could not pay it. It was as the Asa P. Potter revelations showed: the whole outfit was rotten and went to pieces a little while afterwards.

Q. So did Stanton & Coffin?

A. Yes; but they paid me before they did.

Q. How much is this stock worth at this time—that is, the stock of this water company?

A. I don't know.

Redirect examination.

Questions by Mr. LOOMIS:

Q. Mr. Smith asked you if you were tendered $75,000 or spoke about being tendered $75,000 by him or somebody representing Wescott & Hanson?

A. No, sir; he never tendered me any money.

Q. Was there any money ever tendered to you by Wescott & Hanson?

A. No, sir; they refused to.

Q. Was there any assurance given to you by Wescott & Hanson that they would pay you $500,000 on their contract if the court should render a decree enforcing it?

A. Mr. Smith claims so, but I never saw any document of that kind.

Q. Did they ever show you any bond to pay any money or tender you any money?

A. No, sir.

Q. What assurance did you have that they could comply with this contract?

A. None. I found while in Boston that Mr. Hanson was nothing but a bond clerk in the Maverick bank—a man without means.

Q. If this $60,000 had been tendered to you, as they agreed
37 to give it to you in Boston, would you have entered into formal contract as you had agreed to do?

A. Yes, sir; I would have sold them on the spot.

(Witness excused.)

A. A. HURD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows, to wit:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name.

A. A. A. Hurd.

Q. What is your business?

A. Attorney-at-law.

Q. How long have you been so?

A. Twenty-nine years.

Q. How long have you been practicing law in the State of Kansas?

A. Twenty-nine years in the State of Kansas.

Q. How long have you been located in Topeka?

A. This is my twentieth year in Topeka.

Q. State whether or not you and Mr. Dunlap were employed by Mr. Joab Mulvane in the case of Wescott & Hanson against Mulvane and others, pending in the U. S. circuit court for the district of Kansas.

A. We were.

Q. State for what Mr. Mulvane employed you gentlemen in that case.

A. To assist in getting rid of the temporary injunction which had been granted in the Federal court to restrain him from turning over the stock of the Topeka Water Works Company to the firm of Coffin & Stanton, in New York, to whom he had contracted to sell and deliver it.

Q. Did Mr. Mulvane employ you to represent him on the merits of the case outside of the injunction matters?

A. Why, no, sir; not at that time. The object of the employment was wholly to get rid of the temporary injunction.

Q. After the injunction was got rid of who continued in charge of the case?

A. I don't know; I quit it after that; did not have anything to do with it after that.

Q. Is that true of Mr. Dunlap also?

A. I think so; yes, sir; if we rendered any services, it was something very slight, something we never made any charge for. We might have done some little thing after the order was made by Judge Caldwell dissolving the temporary injunction, but never made any charge for it.

Q. Then the charge which you and Mr. Dunlap made was for services exclusively in connection with the injunction proceedings in the case?

A. Yes, sir; in connection with the dissolution of the temporary injunction.

Q. Now, Mr. Hurd, you appeared for other defendants in the case than Mr. Mulvane. State how that happened.

A. I think possibly my name appeared as attorney for the Topeka Water Works Company. I don't know whether it did or not—the old company. I am not certain about that. I appeared for Mr. Mulvane. I did not appear for anything else. Anything I did was for the purpose of aiding Mr. Mulvane in procuring a dissolution of this temporary injunction. I was not employed by anybody except Mr. Mulvane.

Q. Then if your name and that of Mr. Dunlap appears representing other defendants in the case was it solely by virtue of your employment by Mr. Mulvane?

A. Yes, sir; we were not employed by anybody else; did not consider ourselves attorneys of anybody else and did not make any charge against anybody else.

Q. Do you know what your object was in appearing for these other defendants?

A. I think Mr. Mulvane was president of the old water works company. That company, I think, was a party and was enjoined in the matter. I think he requested us to represent that company at the same time we represented him.

Q. And the object in doing so, in appearing for them, was what?

38 A. The object was to get rid of this injunction, so Mr. Mulvane could carry out his contract with Coffin & Stanton.

Q. It was all, then, in the interest of Mr. Mulvane?

A. Yes, sir; we presented our bill to Mr. Mulvane and did not present any to anybody else.

Q. Examine that and state if that is the bill you presented.

A. Yes, sir; that is the bill.

Q. What is the amount of it?

A. $6,000.

Q. Who was it paid by?

A. It was paid by Joab Mulvane.

Q. What was the idea in inserting the names of the other parties?

A. I don't remember now, unless it was, as I say, at Mr. Mulvane's request: we had acted as attorneys for these other parties also. In fact, my remembrance would have been that the other names were not inserted.

Q. You understood that you were merely representing Mr. Mulvane?

A. Yes, sir.

Q. And representing these other parties to further his interest?

A. Yes, sir; at his request to further his interest.

Q. Now, I will ask you whether or not in your opinion the amount charged by you and Mr. Dunlap was a reasonable amount for the services performed by you in the case.

Mr. HISTED: We make the same objection as we made this morning to testimony on the subject of attorneys' fees.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. Yes, sir; I think it was.

Q. Do you remember the amount charged by Mr. McFarland?

A. Why, my understanding was that he charged $6,000. I will not be certain about it.

Q. What, in your judgment, would have been a reasonable charge for Mr. McFarland to make for his services to Mr. Mulvane?

A. I think $6,000 would be a reasonable charge for his services rendered Mr. Mulvane. In fact, I think a considerably larger charge from him and from Dunlap and myself would have been reasonable. I think there could have been a charge of ten thousand dollars and been very reasonable.

Q. Why do you state that?

A. On account of the character of the case, the amount involved, and what it amounted to to Mr. Mulvane to get rid of it.

Q. What do you consider the amount involved?

A. The amount involved was very large, when you take into consideration the character of the case and the surrounding circumstances. The plaintiffs alleged that Mulvane had agreed to sell them the stock of this company and transfer it to them for an amount—I think five hundred thousand dollars. Anyway, there was a difference between the amount they claimed and the amount at which he had contracted to sell it at of $50,000. He had received $50,000 more from Coffin & Stanton than he would — received from the plaintiffs in this injunction suit if they succeeded in compelling him

to carry out the contract and if they were able to carry it out; and in addition to that, Mr. Mulvane would have been subject to suits for damages by Coffin & Stanton, which in my opinion could very readily have been shown to be $250,000 to $300,000 if he had not been able to carry out the contract which he had made with them and which he was anxious to carry out. In addition to that, if he was not able to dispose of the temporary injunction so that he could carry out the contract, it would have been only a very short time until other damages would have accrued, and Mr. Mulvane could not have escaped from the payment of those damages unless it was
39 through bankruptcy for the reason that the other arrangements were all made, as we knew at the time, and that was the reason we were in such a hurry and took every proceeding we could think of in consultation between all of us in order that Mr. Mulvane could carry out his contract with Coffin & Stanton, in order that they might carry out their contract with the parties that they had arranged to dispose of the bonds of the new company to at a large profit to themselves. They succeeded in that, and by that means Mr. Mulvane was relieved from suit for damages by Coffin & Stanton; that in addition to the fifty thousand dollars in cash which he was getting more than the alleged contract with the plaintiff in that suit. In addition to that, there was no certainty in my mind that if they were successful in maintaining this injunction that the plaintiffs would ever be able to pay that five hundred thousand dollars.

Q. Why was there no certainty upon that?

A. From the information we had as to their standing and character and financial ability, and I think the whole outfit became bankrupt shortly after that before the suit on its merits was finally disposed of.

Q. What, in your opinion, would have been a reasonable charge, in the aggregate, to make for attorneys' fees against Mr. Mulvane alone for services rendered to him in connection with the injunction proceedings in that case?

A. I think $25,000 would have been a very low fee to dispose of the temporary injunction in that case in time to save him from action by Coffin & Stanton.

Q. How many meetings did you have or hearings before Judge Foster?

A. I don't know; we had a good many, and we went to Little Rock and had another round before Judge Caldwell, and I guess that is the only case on record where Judge Caldwell has granted an (—) of that kind under the circumstances.

Q. Why was that?

A. It was because Foster was sitting as circuit judge at the time the order was made in Topeka, and it is a rule that the regular circuit judge will not interfere with an order of the district judge sitting as circuit judge.

Q. And it was considered necessary to get the circuit judge to take the matter up?

A. Yes, sir.

Q. Was there not an effort made on the part of Mulvane's attorneys, yourself, and others to get Woodbury & Moulton in the case before Judge Foster, so that the court might be ousted of its jurisdiction?

A. Well, we made the point, I know, that the court did not have jurisdiction because they were necessary parties and were not in the jurisdiction of the court.

Q. Was that point conceded by the attorneys on the other side?

A. I think it was resisted. I know they resisted every point we made.

Q. That point was presented before Judge Foster?

A. Yes, sir.

Q. Now, it appears that you and Mr. Dunlap prepared or signed and filed some appearances for some of the defendants in this case—answers, pleas, demurrers, and so on. I want to know whether or not, in your judgment, that was necessary or proper in pursuance of your employment to get rid of the temporary injunction.

A. I think it was proper, and some of the attorneys thought it was necessary to file all those motions and pleas, etc.

Q. Did Judge Caldwell take into consideration, in ruling upon the motion to dissolve, the pleadings and proof which had come in before the matter was presented to him?

A. It has been so long I don't remember what he did consider.

Q. I will call that to your attention.

A. Well, I have not seen it since it was made.

Q. Look at this (indicating) and refresh your recollection.

A. That is the order.

Q. Did Judge Caldwell rule upon anything except the motion to dissolve?

A. That was all.

Q. Now, after reading this order, state whether or not Judge Caldwell took into consideration the pleadings which had been filed in the case.

A. He undoubtedly must have done so in deciding it upon that question.

Q. What causes you to think that?

A. (The witness reads the order as contained in the record.)

Q. That was to postpone the consideration until when?

A. "Until the coming in of the pleadings and proof now before me on this subject."

Q. He justifies himself in taking it up after another circuit judge had taken it up, because in the meantime additional pleadings and proof had come in?

A. Yes, sir.

Q. Were there other motions to dissolve besides this?

A. My remembrance is that there were quite a number of motions filed. I think everybody connected with the case filed some kind of a motion to get rid of that injunction.

Q. You were there representing Mr. Mulvane?

A. Yes, sir; upon a motion to dissolve this temporary injunction.

Q. Did you argue it?

A. Yes, sir.

Q. Did all these various attorneys employed by Mr. Mulvane a pear in these various hearings?

A. I think so.

Q. Did they represent him?

A. Yes, sir. Mr. Dunlap was not there, but I was there. were acting together as partners.

Q. Did these attorneys represent Mr. Mulvane in this injuncti proceeding according to the best of their ability?

A. I think they did; they were successful, anyway.

Q. You worked pretty hard in the case?

A. Yes, sir; we did; all of us. We knew it was a matter of t utmost importance to Mr. Mulvane. We did everything we cou to get rid of that temporary injunction.

Q. If there was anything else you could have done you do know what it was?

A. No, sir.

Q. What in your judgment would have been a reasonable fee Mr. A. L. Williams to charge for his services in that case, in conn tion with the temporary injunction, exclusively for services render to Mr. Mulvane?

A. $5,000.

Q. How as to Mr. Hagan?

A. The same; probably a little more. Mr. Hagan came into t case before Mr. Williams did.

Cross-examination.

Questio is by Mr. SMITH:

Q. Are you still employed by Mr. Mulvane?

A. I am not.

Q. I infer from your making argument on the stand that y were still retained by him.

A. No, sir: I was asked my reason for thinking that was a reas able fee, and I stated why I thought so.

Q. When were you first employed by him?

A. O, I can't give the date, but shortly after the commenceme of that suit. I think the next day after the temporary restraini order was served.

Q. Do you know George P. Wescott?

A. I think I met him.

Q. Do you know Samuel Hanson?

A. I don't know whether he was here or not, was he?

Q. I don't know.

A. I don't know whether I met either of them or not. In fact don't think I did. I don't think either of them was here after t suit was commenced.

Q. Do you know anything about them at all?

A. Only what I have heard.

41 Q. What have you heard to justify you in saying they a bankrupt?

A. I heard the Maverick bank had failed.

Q. What has George P. Wescott, who lives in Portland, Maine, to do with that bank?

A. Well, the other man is a clerk in the Maverick bank.

Q. What of that?

A. They attempted to prove in this case that the Maverick bank was behind them and was going to furnish the money. I don't know anything about Wescott personally, but I say my understanding was that the whole outfit had failed.

Q. Didn't you say on the witness stand he had failed?

A. I said I understood they had failed—that is, the Maverick bank.

Q. Didn't you intend to have the jury think Wescott and Hanson had failed or were insolvent?

A. It was proved in this case that the Maverick bank was backing them and they were expecting to get the money there.

Q. Then you did not intend to give the jury that impression?

A. As far as my own knowledge is concerned, I know nothing about him.

Q. What do you know about Hanson?

A. They said he was a man of no financial ability.

Q. Who said that?

A. Evidence to that effect was produced.

Q. What for?

A. I don't remember.

Q. Turn to the record.

A. I don't remember whether there is any. I know that the statement was made that they relied upon the Maverick bank to get the funds, and this man Hanson was simply a clerk in that bank.

Q. Why do you say to the jury that Wescott & Hanson were insolvent?

A. I did not say they were insolvent or bankrupt. I said I did not believe they would be able to carry out the alleged contract with Mr. Mulvane.

Q. Why do you believe that?

A. Because it was stated somewhere in that case they were relying upon the Maverick bank to get the money to carry out the contract, and before this suit was disposed of on its merits that bank had failed.

Q. Wasn't the bank failure not for a year after this time?

A. I can't give you the date.

Q. Don't you know that bank was one of the strongest banks in this country when this litigation was commenced?

A. I don't know; I can't tell you.

Q. Why employed you?

A. Joab Mulvane.

Q. He employed you and Mr. Dunlap?

A. He employed the firm; he spoke to me personally.

Q. Did you have a partnership?

A. Yes, sir.

Q. What other business were you engaged in?

A. I was attorney for the Atchison, Topeka & Santa Fe Railro Company.

Q. What was Mr. Dunlap's position?

A. He was attorney also of the same company.

Q. Both drew salaries from that company?

A. Yes, sir; and both had the privilege of doing outside busine too.

Q. What did Mr. Mulvane state to you when he came to empl you?

A. He said he wished to hire me to consult with and confer wi Mr. McFarland and help to get rid of that temporary injunctio that was the substance of it.

Q. Were you not employed to defend the suit generally?

A. I don't think I was.

Q. Why did you file an answer to the merits then?

A. Because we did everything that was necessary to do in ord to get rid of that temporary injunction.

Q. You did not have to file an answer to the merits for that, d you?

A. I don't think we did, but in discussing these questio
42 some attorneys thought it wa*d* advisable to file certain pap that others did not think it was advisable to do, and in the discussions we decided to file anything anybody thought it w advisable to file.

Q. Was there intricate or novel questions of law involved in th controversy?

A. Well, I don't know but there was; yes, sir

Q. You knew as counsel for the defendant that Woodbury a Moulton were joint parties with Coffin & Stanton to this contra and you knew Mr. Woodbury was a citizen of the State of Mai being a citizen of the same State as one of the complainants in th case; you knew that fact?

A. Yes, sir.

Q. You knew Woodbury & Moulton were necessary parties terminate the controversy?

A. We thought so.

Q. When did you learn that fact?

A. I don't know just when it was; some time after we first co menced.

Q. Well, knowing that fact, then, didn't you know that upon th fact being brought to the attention of the Federal court that th cou*ld* would say, "This court is without jurisdiction," and, as a matt of course, dissolve the injunction?

A. We didn't succeed in getting it dissolved, as a matter course, when we first raised it here in Topeka.

Q. Because you did not have proof of the fact?

A. Well, we thought we had.

Q. Didn't you know, as a matter of fact, that the court would that?

A. I did not know whether it would or not; no, sir.

Q. You knew it if the court was convinced that Woodbury and Moulton were necessary parties to the suit?

A. If the court was convinced of that fact; yes, sir; but the trouble was to convince the court.

Q. Then all you had to do was to convince the court that Woodbury & Moulton were participating in this contract. Now, what great question was involved in that to justify you in testifying that a man would have a right to charge $25,000 for that?

A. It is not the importance of the question, but it is often the amount involved and the effect an adverse decision would have upon the client's interest.

Q. Then you would charge according to the possible effects of an adverse decision and not for the simple services rendered?

A. According to the services and because of the effect it would have on Mr. Mulvane's interest.

Q. So you believe in holding a man up and making him pay an enormous fee simply because he is unfortunate enough to be in a position to suffer in case of an adverse decision?

A. I think Mr. Mulvane would have been very glad to enter into a contract if we could have guaranteed the results to pay fifty thousand dollars for it; would have been very glad to do it. Mr. Mulvane never made any objection to the size of my fee. He said he was well satisfied with the service, gave me his check for it, and looked pleased.

Q. You were retained by him to represent the Topeka Water Works Company and the Topeka Water Supply Company?

A. Only incidentally.

Q. Well, I don't care how.

A. Yes, sir.

Q. You appeared and filed answers for them?

A. Yes, sir; whatever was filed.

Q. You filed a motion to dissolve the injunction?

A. Yes, sir.

Q. You made a general charge against Mr. Mulvane for all services rendered by you in the case. Now, Mr. Hurd, please tell the jury what you actually did. What labor did you perform? How many times did you go into court?

43 A. I can't tell you the number of times. We went in frequently, however.

Q. How do you justify, then, this enormous charge of this kind without being able to tell what service you rendered? Was it guesswork on your part?

A. No, sir.

Q. State what you did, then.

A. We filed all the necessary pleadings we thought ought to be filed. I don't remember what they were; I have not looked at the record.

Q. Don't you remember what you did in the case?

A. No, sir.

Q. You think getting an injunction dissolved in a big case would justify charging a man $25,000 attorneys' fee?

A. No, sir. I have a vague idea, but I don't remember the details of the pleadings filed in the case.

Q. Then you do say you made a charge of this large fee without knowing what services you rendered?

A. I knew what services I rendered at that time.

Q. What did you do?

A. Got rid of that temporary injunction with the other attorneys.

Q. It was not dissolved at all on the motion of Mulvane, but on the motion of the companies, was it?

A. I believe the motion on which the order was actually entered was *made by Coffin & Stanton.*

Q. Now, tell the jury what you did in this case.

A. Well, I have told you.

Q. To justify you in charging six thousand dollars.

A. Well, we got rid of that temporary injunction and enabled Mr. Mulvane to carry out his contract with Coffin & Stanton.

Q. And the mere fact of calling the U. S. court's attention—your entire services consisted, didn't it, in calling the attention of the U. S. circuit court or Judge Caldwell's attention to the fact that Woodbury & Moulton were necessary parties defendant to this case, and being necessary parties, and one of them being a citizen of the same State as one of the complainants in the case, and therefore the U. S. circuit court had no jurisdiction of the case and the injunction was dissolved; is not that the only thing you did?

A. No, sir; we tried to do the same thing before Judge Foster a number of times.

Q. Did you make an argument at all before Judge Caldwell?

A. Yes, sir.

Q. Who else?

A. Mr. Williams did. I think Mr. Jones made an argument. I don't remember now whether Mr. Hagan did or not. I remember after we got fairly started in the thing Judge Caldwell took the reins in his own hands and ran it the balance of the way.

Q. And did not let anybody have an argument after that?

A. No, sir.

Q. He would not let us open our heads, would he?

A. Yes, sir; he let you talk a while.

Q. He would not let me talk at all. Wasn't it a fact that as soon as he got the idea that that one fact existed, that there was a cocitizenship of complainant and defendant in the case, that he dissolved the injunction?

A. I think he did; yes, sir.

Q. Now, that is all the work you had to do, wasn't it?

A. No, sir.

Q. To bring the court's attention to that one fact; wasn't that the only question involved?

A. We had to look up the authorities to prove that was the law.

Q. Can you find an attorney upon the (*fact*) of the *the* earth who will not concede that if the party is a necessary defendant and is of the same citizenship as the plaintiff the court has no jurisdiction; can you find an attorney to dispute that fact?

A. I know you and Mr. Rossington did dispute it at that time before Judge Foster and Judge Caldwell.

44 Q. No, sir; never; not upon its being shown that he was a necessary party. Now, don't you remember anything you did in that case except that one thing?

A. I don't remember. We filed a number of different motions.

Q. Did you ever appear before Judge Foster?

A. Yes, sir.

Q. How many times?

A. Two or three times.

Q. *On what?*

A. On motions to dissolve and, first, to resist the granting of a temporary order.

Q. Are you not mistaken in that?

A. No, sir.

Q. Was not the restraining order granted without any notice?

A. The temporary restraining order was; yes, sir; then a day was set for the hearing of the temporary injunction and we appeared for that.

Q. Is not that the only time you appeared before him in that case?

A. No, sir; we were before him more than once, but it may have been a continued hearing of that one motion.

Q. So you think the only time you ever appeared before Judge Foster at all was on motion to dissolve the temporary injunction?

A. No, sir.

Q. And the only time you ever appeared before Judge Caldwell at all was when you went to Little Rock and brought to his attention the fact that the parties were citizens of the same State and he dissolved the injunction?

A. We went before Judge Caldwell once.

Q. How much labor was involved by you in preparing this motion and how much time was consumed by you in appearing before Judge Foster and Judge Caldwell?

A. We worked on the case continuously from the time we were employed until it was finally disposed of—two or three or four weeks. I don't know how long; all the time we were not engaged in other matters, in the daytime and in the evenings.

Q. You performed your duties as general solicitor for Kansas of the Santa Fe road?

A. Yes, sir.

Q. And Mr. Dunlap performed his duties?

A. Yes, sir.

Q. You did not let this private business of yours interfere with your business as to the company?

A. No, sir.

Q. You did not consume very much time on it, then?

A. Yes; we did.

Q. Did you consume six hours' time?

A. Yes, sir; a good many more than that. We worked very hard on that case, and I think you did the same on the other side.

Q. How long have you known the proposition of law that where

a controversy is between the citizens of the same State the Federal court has no jurisdiction?

A. I think we found it out about the time we were looking up that case. The construction which was placed on that law by Judge Brewer was the first intimation I had that that was the law.

Q. You say you were justified in charging this man six thousand dollars for filing this motion and having the court's attention called to it and having the court say that it did not have jurisdiction?

A. I think so.

Q. What salary were you getting from the Santa Fe road?

A. I don't know as that has anything to do with this case.

Q. I think it has.

Counsel for the plaintiff objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I don't remember at that time.

Q. Well, you were not getting twice that amount, were you?

A. No; I did not get twice that amount.

45 Q. You were not getting more than one-third in excess of that amount?

A. I don't remember what I was getting at that time. I know what I am getting now.

Q. Well, I don't care anything about that. Do you say you were working for a corporation at that time and don't know what they were paying you?

A. I don't remember what they were paying me at that time.

Q. You were supposed to give your entire time and attention to that work?

A. My salary has varied at various periods.

Q. You had general charge of the entire litigation of this great corporation in Kansas, hadn't you?

A. Yes, sir.

Q. At the same time you had general charge and control of the entire litigation of the St. Louis & San Francisco road in this State at that time?

A. Yes; I think I was attorney of that road at that time, but I did not get anything for that, however.

Q. And the interests of these corporations amount to a great many millions of dollars, and you were their adviser and looked out for all their litigation?

A. I did; yes, sir; in the State of Kansas.

Q. And still you say, do you, that for a simple motion to dissolve an injunction on the ground that the court has not jurisdiction you would be justified in charging a client half or two-thirds as much as the amount of money that you get for your whole year's services to this corporation?

A. I certainly do. Considering the amount involved and the circumstances connected with it, the conditions, and so forth, it might be worth a great deal more to do one hour's work in the case than it would be to work a year on other classes of service with other conditions existing.

Redirect examination.

Questions by Mr. LOOMIS:

Q. This point with reference to Woodbury & Moulton being residents of the same State with one of the complainants, was that brought up before Judge Foster?

A. We tried to bring it up before him.

Q. Was it suggested in open court that they were residents of the same State.

A. Yes, sir; it was argued there.

Q. Was it argued in the presence of Rossington, Smith & Dallas?

A. Yes, sir.

Q. Did they offer upon that suggestion being made to dismiss the case?

A. No, sir.

Q. Did they offer at any time to dismiss the case?

A. No, sir.

Q. Notwithstanding the fact it was brought to their notice and attention that the court would be ousted of jurisdiction, they still persisted in pursuing their injunction?

A. Yes, sir.

Q. While you were connected with the Santa Fe and getting a salary from them, were you or were you not permitted to take outside business?

A. I was.

A. H. HORTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.

A. Albert H. Horton.

Q. What is your business?

A. I am an attorney-at-law.

Q. Where are you now located in the practice of law?

A. In this city.

Q. How long have you been engaged in the practice of law, Judge?

A. I have been judge and practicing law for thirty-seven years in Kansas.

Q. How long were you chief justice of the State of Kansas?

A. 18 years.

Q. The balance of the time have you been engaged in the active practice?

A. A short time I was district judge.

Q. For how long a time?

A. Five years.

46 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of

facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty thousand dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty thousand dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagen, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution, if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of

their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
47 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. *Immediately* thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys before Judge Foster to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant, and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant A. L. Williams, lawyer, of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell, at Little Rock, and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost because one of them was a citizen of the same State as one of the complainants.

The complainants Wescott & Hanson were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock—they were not to invest a dollar of their own money in the deal—and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract the parties whom Wescott & Hanson represented refused to make the sixty thousand dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such em*pol*yment appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the pro-

fessional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case, as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorney's fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

48 Mr. SMITH: The defendant objects to the question as incompetent, irrelevant, and immaterial, argumentative *in form* and containing misstatements of facts, misleading and contrary to the testimony already offered by the plaintiff in the case, and because the statement contained in it forms no correct basis to enable the witness to testify as to the value of the services rendered in the case in which suit was brought.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. I would say twenty thousand dollars would be a reasonable fee.

Q. Are you acquainted with J. D. McFarland, Eugene Hagan, Hurd & Dunlap, and A. L. Williams?

A. Yes, sir.

Q. How long have you known them?

A. Some of them I have known for twenty-five years or longer; others for ten or fifteen years.

Q. Have you known them as attorneys, practicing lawyers?

A. Yes, sir, and practicing also. I based my estimate of the reasonable value upon their character and standing. I do not believe that Judge Caldwell or any other judge would have taken up the case after it had been decided and disposed of by Judge Foster excepting for the ability and standing and influence of those particular lawyers.

Counsel for the defendant moves the court to strike out the answer of the witness as to the value of services.

Q. Is that the only element you take into consideration?

A. No; I took into consideration the facts you read in the question.

Q. All the facts set forth in the question?

A. Yes; but I say, in *in* addition to that, the ability of the lawyers aside from that stated in the question, would in my opinion have very much to do with the final result obtained.

Mr. SMITH: The defendant moves the court to strike out the testimony with reference to the value of services for the reason that the witness was asked a question upon a statement of facts, and he has augmented that statement of facts by putting in other consideration not covered by the question. The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

Cross-examination.

Questions by Mr. SMITH:

Q. Your answer is based upon the fact that all the statements made in the hypothetical question are true?

A. Yes, sir, of course.

Q. If it should appear, for instance, that Mr. Mulvane would not have lost his entire fortune if this injunction had been sustained, that would reduce the fee?

A. Would reduce *the fee, of* course.

Q. Do you deem it necessary in ordinary cases for the appellant to employ half a dozen lawyers?

A. No; I do not always deem it necessary in ordinary cases to do so, and yet in cases involving great peril to a client I believe it is the custom and practice to do so very often.

Q. Is it your experience that a multitude of counsel in a case results generally disastrously to the interests of a client?

A. I sometimes think two firms are sufficient for any case, if they are able, competent lawyers.

Q. Don't you think two gentlemen at the bar of high standing, integrity, and recognized professional ability are all that is necessary?

A. Generally so, so far as the case is concerned. It may be necessary to have associate counsel in the way of preparing evidence and taking depositions, but in the considerations of this case it seems to me the action of Judge Caldwell was a little unusual, and therefore the ability and number of counsel undoubtedly had a good deal to do with that result.

49 Q. Don't you think the judge's arbitrary notion had a good deal to do with it?

A. I know the judge took action which was quite unusual to take, and yet it resulted for the benefit of the client, and the numerous counsel, I believe, had very much to do with that result.

Q. Do you think the number of counsel down there had anything to do with it?

A. I think they necessarily did. In my practice a United States circuit judge is very slow to take any action against a district judge who is acting as circuit judge. When I wanted to do it in one case the judge said it was an indecent thing to do.

Q. I quite agree with you on that. It was an unusual proceeding undoubtedly. Is that an element that you think would probably enter into an attorney's charge?

A. I think the ability of the counsel largely induced that decision.

Q. Was it necessarily the ability of the counsel or was it the dogmatic action of the judge himself that induced it?

A. That is a question of mere opinion. I was not present.

Q. Whatever was the cause of it, you think that added a good deal, augmented the fact?

A. I think the ability of counsel had a good deal to do with procuring that decision.

Q. I am asking if the result or action of the judge is not an element that you take largely into consideration in fixing the fee as large as you do.

A. The result which was obtained by the action of the judge, I do.

Q. You don't know anything about how much time was consumed by those gentlemen in this case?

A. I only know by the statement.

Q. All you know is from the statement read by Mr. Loomis?

A. Yes, sir; and the ability of counsel which I know.

Q. If this statement should prove untrue, then your testimony would not be based on anything else except this?

A. No, sir.

Q. Would that fact that these gentlemen mentioned in the statement appeared for other defendants in the case—for instance, suppose they were employed by Mr. Mulvane individually, and then they were employed for Mr. Mulvane as president of the Topeka Water Supply Company, and then by Mr. Mulvane as president of the Topeka Water Company—two companies of which he was president—and they also appeared for other defendants, Coffin & Stanton, and filed answers and appeared for all the parties to this suit, representing all four of the defendants, would that change your view about the value of services rendered?

A. It would if they were employed by them—that is, it would not change the value of the services, but change the question as to who should pay them; but if Mulvane employed them and they did this under his services or direction, with the understanding that he was to pay them, then, of course, the question of payment—then, of course, Mr. Mulvane would be the party liable.

Q. Suppose there is no understanding about it at all; he simply says, "I will go on and take care of the suit," and these various counsel appear for four or five defendants, do you mean to say they are justified in charging twenty thousand dollars to each defendant?

A. If they appeared without authority for the defendants, with the understanding that Mr. Mulvane was to pay them, I don't think the other defendants should pay them, but if they appeared for the other defendants and represented them, then, of course, the various defendants should pay their share.

Q. Suppose they appeared with the authority of the presi-
50 dent of the two companies and represented Mr. Mulvane personally and represented the Topeka Water Supply Company, the *the* Topeka Water Company, and one of them also represented Coffin & Stanton, another defendant, should then the twenty-thousand-dollar fee be divided among the defendants or not?

A. That would all depend upon the character of employment.

Q. Your idea is twenty thousand dollars should cover the entire services rendered in the case?

A. For the injunction; yes, sir.

Witness excused.

A. BERGEN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.
A. Abram Bergen.
Q. What is your business?
A. Practicing law.
Q. How long have you been engaged in the practice of law?
A. Forty-one years, except six months out when I was a judge.
Q. How long have you been practicing law in Topeka?
A. In Topeka I have been practicing ever since the fall of 1882. That would be some fifteen years.
Q. Are you familiar with the practice in the Federal courts?
A. I know something of it. I perhaps am not as familiar as some people, and a great deal more familiar than the average lawyers.
Q. Are you acquainted with J. D. McFarland, Hurd & Dunlap, Eugene Hagan, and A. L. Williams, attorneys-at-law, of Topeka, Kansas?
A. I am.
Q. How long have you known them?
A. I have known them different lengths of time. I have known Mr. Williams since 1865. He has not known me.
Q. Fix a general period.
A. Known Mr. McFarland some twenty-seven years. I have known them all, more or less, for fifteen years.
Q. During that time have you been acquainted with their professional standing and ability as lawyers?
A. I have; yes, sir.

51 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty thousand dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be con-

summated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, if *if* had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of the temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were parties to
52 the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys before Judge Foster to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster

however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant A. L. Williams, lawyer of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell at Little Rock and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost, because one of them was a citizen of the same State as one of the complainants.

The complainants Wescott & Hanson were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock; they were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract the parties whom Wescott & Hanson represented refused to make the sixty-thousand-dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such employment appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the professional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case, as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorneys' fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

53 Mr. SMITH: The defendant objects to the question as incompetent, irrelevant, and immaterial, argumentative in form, and containing misstatements of facts; misleading and contrary to the testimony already offered by the plaintiff in the case, and because the statement contained in it forms no correct basis to enable the witness to testify as to the value of the services rendered in the case in which suit was brought.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. The question, as I remember it, is, How much in the aggre-

gate was the value of all the attorneys' services mentioned in tha question in procuring the dissolution of the temporary injunctio in that case?

Q. I will repeat the latter part of it. Taking into consideratio the nature of the case, the amount involved, the results which woul probably have flowed from an adverse decision, including a possibl lawsuit with Coffin & Stanton *et al.* for breach of contract, the pro fessional standing of the attorneys employed by Mr. Mulvane, th results obtained by them, and all other circumstances connected wit the case as stated in the foregoing, what, in your opinion, woul have been a fair and reasonable attorneys' fee in the aggregate fo the services performed by Mr. Mulvane's attorneys in his behalf i resisting the allowance and obtaining a dissolution of the temporar injunction?

A. I should say twenty thousand dollars.

Cross-examination.

Questions by Mr. SMITH:

Q. Your answer is based upon all the conditions and circum stances being true as stated in the question?

A. Yes, sir; on the hypothetical question which was submitte

Q. If it had been joint employment by Mr. Mulvane for himsel and other defendants, would twenty thousand dollars cover the en tire charge?

A. In my opinion, twenty thousand dollars would be a reasonabl fee for procuring the dissolution of the injunction under the circum stances named, whether it was for one or more parties.

Q. Would the element of time that counsel were required to giv to a motion of this kind have any effect upon the charge you name

A. It might have some effect. At the same time I don't think i ought to be considered very much in that matter. Now, if the cou sel here had worked on this case for a year, and Mr. Mulvane ha lost a year's interest on five hundred thousand dollars, amounting t from twenty-five to forty thousand dollars, perhaps the attorney services would not have been worth so much if they had worked year as if they had accomplished what they did in a few days an got Mr. Mulvane his money.

Q. Suppose they were required to go into court once on a motio to dissolve a restraining order in this town before Judge Foster, an appeared again on the motion to set aside a temporary injunctio and subsequently, within a week or ten days, they went to Litt Rock, Arkansas, and appeared before Judge Caldwell, and there su ceeded in prevailing upon Judge Caldwell to dissolve the injunctio all this occurring within three weeks, would you think twenty thou sand dollars would be a reasonable fee?

A. I think, with that addition to what is stated in the hypothetic question, that it would be a reasonable fee.

Q. What would you deem to be a reasonable fee, supposing the was only fifty thousand dollars involved, and that the only questio presented in court on which the order of dissolution was made wa

the fact that a necessary party defendant was a citizen *for* the same State as one of the complainants; and that fact appearing to the court, the court immediately dissolved the injunction on the
54 ground that the Federal court had no jurisdiction over the case? What, under those circumstances, would be a reasonable charge?

A. If the only thing involved, as your question starts out, were fifty thousand dollars, I don't think the attorneys' fees should be so much as I have already stated.

Q. Well, what do you think it should be under those circumstances?

A. And without any of the other circumstances mentioned in the first hypothetical question? Just taking your question alone?

Q. Yes, sir.

A. And by itself?

Q. Yes, sir.

A. I should think five thousand dollars was a reasonable attorneys' fee for the services and under the circumstances alone which you have mentioned.

Q. And that would be apportioned among the various defendants counsel appeared for?

A. No, I didn't say that. I think that would be a fair attorneys' fee for procuring a dissolution of an injunction involving that amount and solely under the circumstances which you mention.

Q. Would the fact of there being four or five different attorneys in this cause augment the total charge? Suppose that one counsel should appear—even under the hypothetical question put by Mr. Loomis—suppose one counsel should appear and accomplish the same result accomplished by these five or six gentlemen, would he be justified in making the same charge, the entire amount?

A. I think that each of the attorneys was entitled to a reasonable compensation. I think they were appropriate to be had under the circumstances. Where there is but one counsel there is danger of his becoming sick or loosing his energies in some way, or not thinking of something, or of the responsibility involving him weighing him down, where he has not divided the responsibility with other lawyers, whose opinion he respects, to help him. Then, more than one thinks of different things, and under such circumstances as these, more than one has more influence with most judges in expediting matters and hurrying them up than if there is just one man alone.

Q. You think the element of health cuts figure in the matter of counsel fees which an attorney should charge; that a robust man should charge larger fees than a weaker man should charge?

A. I think that four men on a large case are in the aggregate entitled to more compensation reasonably than if there was but one man.

Q. Well, when, in your view, should this aggregation of counsel cease? Should it keep on increasing larger, keep on increasing as the number of counsel multiplied? Suppose a man should employ twenty attorneys in this case, would these twenty attorneys be justi-

fied in charging an aggregate of twenty times what one counsel would charge or five times what four counsel should charge? Does that element cut any figure at all?

A. It cuts figure in this way, that I think it is a reasonable attorneys' compensation to have a reasonable number of attorneys in such a case as that, such a number as may be proper to have.

Q. Is it your experience as a member of the bar that causes sometimes suffer somewhat by a multitude of counsel?

A. Sometimes they do, when each one of the counsel leaves it to some other to do the thorough work in the case; that is sometimes the result.

Q. Is it not your experience at the bar that cases are better handled, most expeditiously attended to, and better results accomplished by, say, two counsel than where there is four or six or a greater number?

A. That depends upon circumstances. I don't know how a greater number than six could work to good advantage in a case, but I have known three or four to work to good advantage in different branches of the case.

55 Q. Is not that only where there is lots of testimony to take? But when there is only one proposition of law involved, where the question is submitted upon one single fact, is there any necessity in your view, in your experience at the bar, of employing half a dozen counsel?

A. I have often seen where one or two counsel would present a proposition which seemed to me to be very plain to the court; the third one would have a little different shade in which he presented it or a little different manner or with a little more tact. The court would at once fall in with his view and perhaps shut off all argument on either side.

Q. That would be owing to the fact that the first two counsel had not sufficient ability to present the matter properly to the court?

A. No; it might be because they didn't have the tact or didn't strike upon the accident of presenting it in the way which the court would see it.

Q. Then you think that a client should employ half a dozen counsel in a case for fear some one of the counsel should forget some one point; that while five counsel should forget five points six counsel would remember them all?

A. I didn't say that.

Witness excused.

E. S. QUINTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.

A. E. S. Quinton.

Q. What is your business?
A. Lawyer.
Q. How long have you been practising law?
A. Twelve years here.
Q. In Topeka?
A. Yes, sir.
Q. Are you acquainted with Messrs. J. D. McFarland, Eugene Hagan, Hurd & Dunlap, and A. L. Williams, of this city?
A. I am.
Q. Are you acquainted with their professional standing as lawyers?
A. Yes, sir.
Q. Are you familiar with the practice in Federal courts?
A. Yes, sir.

56 Q. What in your opinion would be a reasonable attorney's fee for legal services rendered under the following state of facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty-thousand-dollars cash payment in accordance with the agreement of December 14th and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid, and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order, without bond, was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it

necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if if had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
57 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration, Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell, at Little Rock. An effort was also made by Mulvane's attorneys, before Judge Foster, to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant, A. L. Williams, lawyer, of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell, at Little Rock, and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost because one of them was a citizen of the same State as one of the complainants.

The complainants, Wescott & Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock. They were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott & Hanson represented refused to make the sixty thousand dollars payment in accordance with the terms of the agreement. There were other de-

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Mr. SMITH: The defendant objects to the question as in- competent, irrelevant, and immaterial, argumentative in form d containing misstatements of facts, misleading and contrary to e testimony already offered by the plaintiff in the case, and be- use the statement contained in it forms no correct basis to enable e witness to testify as to the value of the services rendered in the se in which suit was brought.

The court overruled the objection; to which ruling of the court e defendant at the time duly excepted.

A. I should think twenty-five thousand dollars would be a rea- nable fee.

Cross-examination.

Questions by Mr. SMITH:

Q. You raise it five thousand dollars over the other gentlemen, o you?

A. That is what I consider to be a reasonable fee.

Q. What is your judgment based on?

A. Based on the conditions and facts stated in that hypothetical uestion.

Q. If the conditions stated in that question did not exist, then our testimony would be different, would it?

A. Of course, if that wasn't the question or wasn't the case, I vouldn't make that answer.

Witness excused.

D. R. HITE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. Please state your name to the jury.
A. D. R. Hite.
Q. What is your business?
A. Lawyer.
Q. How long have you been practicing law?
A. I was admitted to the bar in 1891.
Q. Are you familiar with the practice in the Federal courts?
A. Yes, sir.
Q. Are you familiar with Messrs. J. D. McFarland, Hurd & Dunlap, Eugene Hagan, and A. L. Williams, of this city?
A. Yes, sir.
Q. And with their professional standing and ability as lawyers?
A. Yes, sir.
Q. Did you hear this question read? (This refers to the same question which was propounded to A. H. Horton on page 206 *et seq.* of this case-made.)
A. Yes, sir.
Q. You may answer it, then, without having it repeated to you.

Mr. SMITH: We offer the same objection to this question as before.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. I think the services would be worth from eighteen to twenty thousand dollars.

Cross-examination.

Questions by Mr. SMITH:

Q. That is, services rendered to the defendants in the case?
A. Yes, sir.
Q. Your testimony is based entirely upon conceding the truth of all those statements made in that question?
A. Entirely; yes, sir; I know nothing about the case at all.
Q. From your experience at the bar do you think a client's interest is protected better by the employment of quite a number of attorneys?
A. I think it is in a very big case; yes, sir.
Q. What do you mean by a big case—where there are numerous questions of fact and numerous questions of law involved?
A. No; where there is a large amount of money involved.
Q. Where a large amount of money is involved and only one question of fact and one question of law involved, do you think the employment of six lawyers is necessary?
A. If the question of fact or the question of law is a very simple

one, I should think there would be no necessity for employing very many lawyers.

Q. Conceding that that question of fact was simply this, whether a party was a necessary defendant to the cause, and it appearing that the party was a necessary party to the cause, to a case pending in the Federal court, and a necessary party defendant was a citizen of the same State as one complainant, that would be a very simple question of law, wouldn't it?

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A. Yes, sir.

Q. A simple question of fact?

A. Yes, sir.

Q. That being the only true issue involved, even conceding there was five hundred thousand dollars involved, do you think twenty thousand dollars fee is a reasonable fee on that question?

A. I don't think it would if the case had never been presented at all, but if that question had been presented to a court of competent jurisdiction and the ruling had been adverse and the time was growing very short, as I understand it did in this case, I should think the fee would be commensurate for getting that overruled.

Q. The fact that some judge arbitrarily overruled a co-ordinate judge upon a question of fact and question of law—do you think counsel would be justified in charging a larger fee?

A. Well, sir, I can only say to this question that I do not think either one of those judges are to be very lightly considered. I think Judge Caldwell and Judge Foster are men who do not do things like that, and, if I remember right, the question that is in this hypothetical question of diverse citizenship of parties—that up to and about the time of the trial of this case that was not a simple question of law; there was a good deal of dispute about that.

Q. It has always been a simple question of law to you that a Federal judge——

A. Yes, sir; but, then, the question here was where the complainants had to be brought in.

Q. But the legal proposition that the Federal court has no jurisdiction over cases between citizens of the same State is a simple proposition, isn't it, and always has been?

A. If the jurisdiction is claimed on the ground of diverse citizenship, that has always been very simple.

Q. And this case being a case where the Federal court was invoked solely on that ground, it is a very simple question?

A. It is to me; but, it has been since I have known anything about it that that question has been well settled.

Q. It has always been settled that Federal courts had jurisdiction over cases between citizens of the same State?

A. If that was the only thing, that has always been settled.

Q. The only question of dispute in this case would be whether Woodbury and Moulton were necessary parties defendant to this case?

A. Yes, sir; their being citizens of the same State as complainants.

Q. That would be the only fact involved in the case?

A. Yes, sir; as I understand it.

Q. Now, where that is the only fact involved in the case, do you think counsel is justified in charging twenty thousand dollars?

A. I think where that state of facts has been presented to a man like Judge Foster and he had ruled against the Mulvane interest in that respect—that under the circumstances presented by this hypothetical question, the sort of a box Mr. Mulvane was in, that it required a good deal of skill on the part of the attorneys and a good deal of nerve, you might say, to take that question before Judge Caldwell, because I have never understand a circuit judge could do or would do such things as that except in very plain cases.

Redirect examination.

Questions by Mr. Loomis:

Q. Whether or not persons are necessary parties is somewhat of a question, is it not, Mr. Hite?

A. Yes, sir; very much of a question.

Q. And from what is that point to be determined?

60 A. It is a mixed question of law and fact, I guess. It is to be determined largely from the pleadings, in the first place, as to whether there are other parties necessary to be brought in there to determine the issue, and also from evidence to be introduced.

Q. The first question would be to determine whether they were necessary parties?

A. Yes, sir.

Q. And then upon the assumption that they were necessary parties, what the legal effect would be upon the jurisdiction of the court?

A. Yes, sir.

Q. That would be another question?

A. Yes, sir.

Witness excused.

Eugene Hagan, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Loomis:

Q. State your name to the court and jury.

A. Eugene Hagan.

Q. What is your business, Mr. Hagan?

A. Attorney-at-law.

Q. Where do you practice law?

A. Topeka.

Q. How long have you been engaged in the practice of law?

A. I think about nineteen years.

Q. Were you one of the attorneys employed for Mr. Mulvane to represent him in resisting the allowance and obtaining a dissolution

of the temporary injunction granted against him in the case of Wescott & Hanson against Mulvane and others, pending in the United States circuit court, district of Kansas?

A. I was.

Q. State whether or not you represented Mr. Mulvane for the purpose of getting rid of the injunction and preventing its allowance.

A. I was employed by Mr. Mulvane for that purpose. I was one of the attorneys for that purpose.

Q. Whom were you employed to represent?

A. Mr. Mulvane.

Q. State whether or not you were employed by any of the other defendants in the case.

A. No.

Q. Did you appear for any of them?

A. If I did it was a mere matter of form or incidental appearance, because I didn't know any of the rest and don't even now know who were the other defendants in the case.

Q. If your name did appear as attorney for any of the other defendants how would you account for it?

A. Well, it was some time that winter, in completing the motion that was filed, in order to get it before the court properly, some one of the attorneys, as a rule, signed the name and appeared there in that way.

Q. Was that for the purpose of more properly protecting Mr. Mulvane's interest?

A. That was exactly it.

Q. In securing the dissolution of the injunction?

A. Yes, sir.

Q. Did you make any charge against any of the other defendants in the case for services performed?

A. No, sir; none whatever.

Q. Do you ever expect to?

A. Never expect to and never in any case considered I was appearing or working for them.

Q. Who did you consider you were working for in the case?

A. Mr. Mulvane.

Q. And he alone?

A. Yes, sir.

Q. Did Mr. Mulvane pay you for your services in connection with that temporary injunction?

A. He did.

Q. How much did you charge and how did he pay you?

A. He paid me three thousand dollars.

Q. For your services in that case?

A. Yes, sir.

Q. Were you employed by him upon the merits of the case?

A. I was not.

Q. When the injunction was dissolved did you cease your connection with the case?

A. I did.

Q. Do you recall how many hearings were had before Judge
61 Foster before you went to Little Rock in the injunction proceeding?

A. I can only give it as I now recollect them. I think I was employed either the same day or the day after Messrs. Hurd & Dunlap were employed, which was probably within a day or two after the restraining order had been issued. I think it was the same day, probably, Hurd & Dunlap were employed. We began to prepare to resist the application for a temporary injunction, and we continued our work on that until the application was heard. If my recollection serves me correctly, I think we appeared after that temporary injunction was issued on a motion to dismiss on the ground that the court had no jurisdiction, and that was argued. We were defeated on that.

Q. Upon what grounds did you urge that the court had no jurisdiction?

A. I believe we put it on two grounds: first, that this kind of an action was not one—was not the proper kind of an action in which to—that the contract could not be specifically enforced. The second was that Woodbury & Moulton were necessary parties, and that they had a common citizenship with the complainant, and for that reason the court had no jurisdiction.

Q. Was that raised before Judge Foster, that jurisdictional question, on account of Woodbury & Moulton being necessary parties?

A. I can only depend on my recollection as it came up; that when the application for a temporary injunction was heard we didn't know that Woodbury & Moulton—Mr. Woodbury, I believe, or Woodbury & Moulton, I forget now which—had a residence in Maine, where one of the plaintiffs had a residence, and I don't believe we knew it, or at least it was very late before we discovered it. The attorneys didn't know that, and just one evening in consultation Mr. Mulvane casually remarked that he was up in Maine; that was the reason we couldn't see him, and then we discovered for the first time after we had been working on this case where Mr. Woodbury lived, and that he had a common citizenship with one of the complainants.

Q. Now, after you learned that fact was it called to the attention of Judge Foster?

A. Yes, sir, and it was argued, and in support of it affidavits were read.

Q. Read in the presence of counsel for Wescott & Hanson?

A. Yes, sir, and I think there is a little opinion in the case somewhere rendered by Judge Foster denying it.

Q. Did Wescott & Hanson jump in and dismiss the case?

A. No, sir.

Q. They still went ahead, did they?

A. Yes, sir.

Q. Mr. Hagan, was the only point urged in the case in the hearings for the purpose of obtaining a dissolution of the injunction that one that the court had no jurisdiction because of the citizenship of the parties; was that the only point urged upon these hearings?

A. No, sir; it was not.

Q. How many other points were urged?

A. Well, when we were first employed we went to work in the case together, and worked together, I think, every day, and probably every night, and the bill in equity, as far as we then knew, had jurisdiction, it disclosed full jurisdictional grounds, and the only relief we could see was that this was not such a contract that could be enforced at all, or if it could be enforced they had a remedy at law for damages, and we went to work on that line, because we were not aware there was a common citizenship, and we exhausted every means to have the court act upon that ground.

Q. Was it urged, Mr. Hagan, that Wescott & Hanson had no such contract, that they had no contract with Mr. Mulvane; was that urged?

A. That was one of the grounds urged upon the application for a temporary injunction, and it was very elaborately briefed and
62 examined by the lawyers before we took it up.

Q. Wasn't that the point upon which the case was finally decided by Judge Riner?

A. I don't remember about that.

Q. State whether or not in your opinion your services in connection with the temporary injunction were reasonably worth the amount you charged, three thousand dollars.

A. I do.

Q. What in your opinion, Mr. Hagan, would have been a reasonable charge in the way of attorneys' fees for the services performed in Mr. Mulvane's behalf in the aggregate in resisting the allowance and obtaining a dissolution of that temporary injunction?

A. I have heard—I know about the case as it was, and I would fix it at twenty thousand dollars, and I don't think it would be an unreasonable fee. I think it is very reasonable.

Q. You think it would have been a reasonable fee in the aggregate for the services rendered for Mr. Mulvane?

A. Yes, sir.

Q. In connection with that injunction?

A. Yes, sir.

Cross-examination.

Questions by Mr. SMITH:

Q. If you had been employed alone would you have felt justified in charging that?

A. Well, I possibly would not, though I should think it was worth it.

Q. What did he say to you when he came to retain you in the case?

A. He said he wanted to retain me. A. My recollection is that David Mulvane said his father wanted to retain me, and that was the first I ever knew there was such a case.

Q. At that time you knew Mr. Mulvane was president of the Topeka Water Supply Company?

A. I may have known it.

Q. And knew he was president of the new company?

A. I didn't know at the time there was any change.

Q. When you found the bill that was filed in court you then ascertained that he was president of the new company?

A. Yes, sir. I think that is the first time I ever knew there had been a new company organized.

Q. You appeared as counsel for the two water companies, didn't you?

A. If I did it was a mere matter of form, and I don't know that my name appears—it may—on the pleadings. I don't know whether it does or not.

Q. You would not file a pleading in a case you were not authorized to file?

A. I certainly would not.

Q. And therefore if your name appears as counsel for the water company, either one of them, you appeared with authority?

A. I appeared there with authority; yes, sir.

Q. You rendered services?

A. Yes, sir.

Q. And rendered common service to both companies, and Mr. Mulvane also?

A. Well, my understanding was at the time that I was there representing Mr. Mulvane. I didn't know anything about the water company, nor anybody else.

Q. Mr. Mulvane was president of the two companies, and you represented him by representing him as president of the two companies?

A. Personally I don't think it was ever contemplated by Mr. Mulvane or myself that I ever had anything to do with that.

Q. One of the first pleadings I turn to here is a motion to dissolve the injunction, wherein your name appears as counsel — Joab Mulvane, Topeka Water Supply Company, and Topeka Water Company. That is true all through the pleadings. You appeared and filed an answer, didn't you, to the merits, representing the water company?

A. Yes, sir; I think it was an answer.

Q. That was in pursuance of employment by Mr. Mulvane?

63 A. No, sir; I will state the circumstances under which that answer was filed; we were not appearing for the defense in that, but before we could have a motion to dissolve filed and it was heard the bill would be in default, and an answer had to be filed and we took it up. I think that is the reason for it.

Q. Aren't you mistaken on that? Don't you know this bill wasn't in default for sixty days after it was filed and motion to dissolve the injunction was immediately filed?

A. The motion wasn't heard for probably sixty days, and that is my recollection.

Q. Aren't you mistaken on that fact? Wasn't the motion heard within thirty days after?

A. The motion was heard probably sixty days after before Judge Caldwell; there wasn't any motion to dissolve that I know of filed in this court at all.

Q. The bill was filed on February 5, 1890. Temporary injunction was awarded on the 13th day of February.

A. Do you find any motion to dissolve in this court here?

Q. Yes, sir; on the 17th day of February didn't you appear for Woodbury & Moulton?

A. What is that appearance?

Q. 17th day of February. You appear to have signed a motion appearing for Woodbury & Moulton, yourself and McFarland, and Hurd & Dunlap.

A. Application to make parties to the suit?

Q. Yes.

A. What day was the motion here filed to dissolve? I don't recall it if there was a motion.

Q. Didn't you appear on the 3rd day of March for the Topeka Water Company? Here is an appearance: "And now comes the defendant, Topeka Water Company, by its solicitors, and enters its appearance in this suit to complainant's bill of complaint filed herein, and hereby enter our appearance as solicitors for said defendant, Topeka Water Company, herein. Dated the 3rd day of March, 1890. Williams & Dillon, Hurd & Dunlap, Eugene Hagan, J. D. McFarland;" and you also entered your appearance for the Topeka Water Supply Company.

A. Those appearances were to have all the parties in court so we could tell whatever rights Mr. Mulvane had.

Q. You rendered services to those people, did you not? Didn't you also sign the answer of the Topeka Water Supply Company, which was filed on the 3rd day of March?

A. If the record so disclosed it I did.

Q. Wherever you appeared as counsel for any of the parties you appeared in pursuance of this employment of Mr. Mulvane?

A. Yes, sir.

Q. At that time he was president of the Topeka Water Company and the Topeka Water Supply Company?

A. Yes, sir; as I stated, I wasn't appearing for him as president of the company; I was appearing for him as an individual.

Q. What right had you to go in and appear for the defendant company unless you was employed?

A. Right they assumed.

Q. You appeared and rendered services for the Topeka Water Company and Topeka Water Supply Company?

A. Yes, sir.

Q. You filed their answers, filed motion to dissolve, and made one common charge for all these services against Mulvane?

A. Yes, sir.

Redirect examination.

Questions by Mr. Loomis:

Q. When a bill is filed in equity, say, upon February 5th of a certain year, when would the answer be due in the ordinary course of business?

A. When the rule day comes.
Q. When would rule day come?
A. The first Monday, whatever it is, in the following month.
Q. That would have been the first Monday in March?
A. Yes, sir.
Q. And then pleadings or answer would have been due?
A. By the first rule day following.
64 Q. That would be the first Monday in April?
A. Yes, sir.

Q. Did you have any certainty when you could get up the motion to dissolve before Judge Caldwell?

A. No, sir; the fact is, when these matters were pending we had no circuit judge, as I recollect it, part of the time. Judge Caldwell was appointed judge just a few days before this matter was heard, and I think the office was vacant of circuit judge for something like two or three weeks, awaiting confirmation or something.

Q. It was very uncertain when you could get the matter before him?

A. Yes, sir; I desire to say that my recollection of the answer is that Mr. McFarland drew it, and it was filed either to be in court properly when the motion to dissolve should appear or to prevent default—to take care of the pleadings until we got rid of the injunction. That was all we had in contemplation.

Q. Didn't you think it was important in the protection of Mr. Mulvane's interests to see there was no default of any defendants in the case?

A. Certainly.
Q. You appeared for them in protection of Mulvane's interests?
A. Yes, sir.

Q. As a matter of fact, wasn't the temporary injunction dissolved by Judge Caldwell, at Little Rock, April 4th, nearly sixty days after the suit was brought?

A. If the record discloses it. I know it was probably about sixty days after suit was brought. He dissolved it the day we went down there and presented it.

(Witness excused.)

J. D. McFARLAND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the court and jury.
A. James D. McFarland.
Q. What is your business?
A. Practicing law.
Q. How long have you been in that business?
A. Over twenty-five years.

Q. Were you one of the attorneys employed by Mr. Joab Mulvane to resist in his behalf the allowance of the temporary injunction o

Wescott & Hanson against Joab Mulvane and others, pending in the United States circuit court for the district of Kansas?

A. I was employed in the case by Mr. Mulvane; yes, sir; when the case was brought—about that time.

Q. Did you, in connection with other attorneys employed by Mr. Mulvane, assist in these injunction proceedings and assist in procuring a dissolution of that?

A. Yes, sir; and in resisting the injunction.

Q. That is, the allowance of the temporary injunction in the first place?

A. Yes, sir.

Q. In representing Mr. Mulvane's interest in the case, in connection with the injunction proceedings, did you also appear for other defendants in the case?

A. I appeared for Mr. Mulvane, the two water companies, and Coffin & Stanton, and also appeared in filing an application with other attorneys for Woodbury & Moulton.

Q. What charges did you make against Mr. Mulvane for the services rendered in his behalf in resisting the allowance of the temporary injunction and in procuring its dissolution?

A. Mr. Mulvane paid me four thousand dollars for my fees for my services in the injunction matters.

Q. Was that for services rendered in the injunction matters alone?

A. Yes, sir.

Q. Did that payment include anything done by you in the case after the temporary injunction was dissolved?

A. No, sir; the four thousand dollars was paid for services
65 in the injunction matters for all of the defendants I appeared for. That did not include the other services rendered by me in the case.

Q. Did you make any charge against any of the other defendants in the case?

A. I did not. My understanding was that Mr. Mulvane was to pay for all of those services.

Q. He was the one that actually did pay the money?

A. Yes, sir.

Q. I wish you would state whether or not in your opinion the amount you charged was a reasonable fee for the services performed by you for which the charge was made.

A. I think the four thousand dollars paid me was a reasonable fee for services in the case up until the time of the dissolution of the injunction.

Q. Services in connection with the injunction proceedings?

A. Yes, sir; and the services as rendered, I suppose, up until the time of the dissolution of the injunction by Judge Caldwell could properly all be said to have been rendered in the injunction proceedings, although there were some answers filed. I would say that including the services up until that time.

Q. In reference to those answers and appearances and other pleadings which were filed by you and your associates, state whether or not it was, in your judgment, proper or necessary to file those plead-

ings for the better protection of Mr Mulvane's interests in the matter of the injunction proceedings.

A. I would regard it important that they be filed when the proper time came to file them, and I should think that the answers—after the answers came in they would have a bearing upon the question of the injunction if that was still pending.

Q. As a matter of fact, did the filing of these pleadings have any bearing upon the ruling of Judge Caldwell in dissolving the temporary injunction?

A. What does Judge Caldwell's order say about it?

Q. I will show it to you. (Hands witness paper.)

A. He says, reading from the record, "And it further appearing that the court granting the temporary injunction postponed consideration and decision of this question until the coming in of pleadings and proof now before me upon that subject."

Q. Then you would say that the fact of the pleadings and proofs being in would have had any influence with Judge Caldwell in the decision which he made?

A. I don't know, but I suppose they had some bearing.

Cross-examination.

Questions by Mr. SMITH:

Q. Didn't you consider yourself capable of handling the case alone?

A. Oh, I——

Q. It was a particularly intricate case, was it?

A. It was a case that involved a great deal to Mr. Mulvane. I wouldn't like to say whether I could or that I would have felt unable or would not. I was called on for assistance.

Q. Do you think it is necessary to have five or six assistants in a case like that—outside of this case, as a general proposition?

A. As a general proposition?

Q. Yes.

A. As a general proposition I would say that generally it is not necessary to have five or six attorneys in a case.

Q. Nothing particularly intricate in this case? It was a question of fact or a question of law, wasn't it?

A. A lawsuit sometimes don't seem intricate after you get through and win it as it does while it is going on.

Q. The only question involved was as to the necessary parties, and if the court should have found that fact to exist, then you know and everybody else knows and as lawyers know that the Federal court has not jurisdiction between citizens of the same State?

A. That was not the only question in the case. When the
66 matter came up before Judge Foster there were other questions argued.

Q. If this fact exist and there is no other question in the case, the court would dismiss the case as soon as that fact became known?

A. My impression is that fact was brought out before Judge Foster in some proceedings before him that Woodbury & Moulton were

citizens of Maine, the same State as one of the complainants, and that he refused to let them in or to set aside, and in the face of that granted the injunction. I don't remember just when that fact was presented to him, but my recollection is that fact was before him and he decided against it.

Q. Do you govern your charges by the fact that there were numerous other counsel in the case or did you charge what you thought the case was worth? Did you think four thousand dollars was a fair charge for the services rendered?

A. Well, I think four thousand dollars was a *fair* charge for the services that I rendered.

Q. Don't you think you could have accomplished the same results if you had been alone?

A. I can't tell about that. Possibly I might; perhaps I might not.

Q. Is it not your best judgment you would have accomplished the same results?

A. That is a very hard question to answer. Looking at it now and knowing all about it I do know about it, it is possible that I might; still I don't know that I could.

Redirect examination.

Questions by Mr. LOOMIS:

Q. Did the case seem so easy when you were fighting it?

A. No; it did not.

Q. Did you make a pretty hard, stiff fight before Judge Foster to prevent the allowance of the injunction?

A. Yes, sir.

Q. Did you make an effort to get rid of the injunction by bringing in other parties and showing the court it had no jurisdiction?

A. After that we made the application before Judge Foster to let in Woodbury & Moulton.

Q. Did you make a pretty hard fight on that?

A. We filed our motion and affidavits in support of it and argued it.

Q. Argued as hard as you could?

A. As well as we could.

Q. Got paid for that?

A. Yes, sir.

Q. Wasn't that a pretty difficult matter, after a district judge sitting as circuit judge had ruled on that, to get it taken up by another circuit judge?

A. It would be regarded so.

Q. Didn't you so regard it at the time?

A. Yes, sir; my recollection is that I did.

(Witness excused.)

Mr. LOOMIS: We now offer in evidence the statement of A. L. Williams.

Said statement was read to the court and jury and is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

Stipulation.

It is hereby agreed between the parties hereto that the following statement, signed by A. L. Williams, may be read and treated as his deposition in the above-entitled cause:

"I was employed by Mr. Joab Mulvane in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, pending in the circuit court of the United States for the district of Kansas, to assist in procuring a dissolution of the temporary injunction against Mr. Mulvane in that case. In pursuance of that employment I, together with other attorneys, appeared for and represented Mr. Mulvane and succeeded in obtaining a dissolution of the injunction. For the services rendered by me to Mr. Mulvane in procuring the dissolution of the temporary injunction in that case, and for no other services, I charged Mr. Mulvane three thousand dollars, which amount he paid me. I also represented Mr. Mulvane upon the merits of the case, but charged a separate fee therefor, which had nothing to do with the services rendered in connection with the temporary injunction. In my opinion the fee charged by me in procuring a dissolution of the temporary injunction was a reasonable fee for the services performed. In my efforts to procure a dissolution of the injunction for Mr. Mulvane, I appeared for some of the other defendants in the case. This was done solely for the purpose of assisting in the case. This was done solely for the purpose of assisting in procuring a dissolution of the temporary injunction against Mr. Mulvane and was done in pursuance of my employment by him. I was not employed by any of the defendants in the case other than Mr. Mulvane; performed no services at their request; have never charged any of the other defendants in the case a fee for my services in that case and never expect to. I have been practicing law in Topeka for more than thirty years last past.

A. L. WILLIAMS."

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11318.

Transcript of Record.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

GEORGE P. WESCOTT and SAMUEL HANSON, Appellants,
vs.
JOAB MULVANE, Appellee.
No. 230.

Appeal from the circuit court of the United States for the district of Kansas.

Filed January 13, 1893.

69 In the Circuit Court of the United States, District of Kansas.

To the honorable the judges of said court:

1. George P. Wescott, a resident of Portland, in the State of Maine, and a citizen of said State of Maine, and Samuel Hanson, a resident of the State of Massachusetts, and a citizen of said State of Massachusetts, bring this, their bill, against Joab Mulvane, a resident of the city of Topeka, in the State of Kansas, and a citizen of said State of Kansas, The Topeka Water Supply Company, a corporation organized under and by virtue of the laws of the State of Kansas, and a citizen of said State of Kansas, The Topeka Water Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas, and a citizen of said State of Kansas, William Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, parties engaged in business under the firm name and style of Coffin & Stanton, in the city and county of New York, in the State of New York, and citizens of said State of New York, and The Atlantic Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State of New York, and humbly complaining, show unto the court:

2. That the amount in controversy herein exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

3. Your orators, further complaining, respectfully represent that prior to the transactions hereinafter narrated, to wit: prior to the 12th day of November, 1889, the Topeka Water Supply Company was a corporation organized and existing under and by virtue of the laws of the State of Kansas, and exercising and enjoying certain liberties, privileges and franchises under and by virtue of its articles of incorporation, and under and by virtue of certain ordinances before that time duly passed and enacted by the mayor and council of the city of Topeka, Kansas. That said liberties, privileges and franchises consisted in a right to supply to the citizens of Topeka, Kansas, water for domestic and other uses, and to the city of Topeka water for fire protection, and in and about the carrying on of said business to enter upon the streets, avenues and alleys of said city of

Topeka, and lay thereunder mains and water pipes for the distribution of water throughout the corporate limits of said city.

70 4. That in addition to the distributive system aforesaid, which at the time hereinbefore referred to had been largely constructed over the greater portion of the streets, avenues and alleys of said city of Topeka, the said Topeka Water Supply Company had a large and valuable franchise, consisting of an extensive brick structure with engines and pumping machinery, and had built, constructed and secured a costly and valuable source of water supply by digging and walling large wells near to the banks of the Kansas river, within the corporate limits of Topeka. That said franchise was exceedingly valuable, and its operation had proven highly profitable to the said The Topeka Water Supply Company, and was continuing to be profitable, and promised a large increase of returns in the future, owing to the same being located in the large, growing and well-built city of Topeka.

5. That prior to the said 12th day of November, 1889, the said defendant, Joab Mulvane, was president of said The Topeka Water Supply Company, and owned a controlling interest or share in its capital stock. That the capital stock of said company at that time was divided into four thousand shares of one hundred dollars each.

6. Your orators further respectfully represent unto the court that on or about the 12th day of November, 1889, on the afternoon of said day, your orators met at the office of said defendant Joab Mulvane in the city of Topeka, Kansas, pursuant to an appointment made between the said Mulvane and said Hanson some three or four weeks prior to that time.

7. That your orators had come to the city of Topeka with the view of entering upon negotiations with the said Mulvane looking to the purchase of said The Topeka Water Supply Company, and to thereby become possessed of the real property and franchises of the said The Topeka Water Supply Company, subject only to a mortgage of one hundred and twenty thousand dollars which rested as an incumbrance upon the property at that time. That pursuant to such negotiations, your orators obtained from the said Mulvane his consent to make such examination of the franchises and water works as they desired to make.

8. That on the following day, to wit: on the 13th day of November, 1889, your orators arranged to meet Mr. Mulvane on the morning and examine the books of said corporation, and later to enter in negotiations for the purchase of said plant. Accordingly, your orators visited the pumping station on the bank of the Kansas river, and made an inspection of the entire system such as they deemed desirable to make to properly give them a complete understanding of the affairs of said corporation.

71 9. That on the following morning, to wit: on the 14th day of November, 1889, your orators again met said Mulvane and went with him to examine the books of the corporation at the office of the water company, and finding everything in satisfactory condition it was arranged by your orators to meet said defendant

Mulvane at the hotel after dinner with a view to coming to some agreement, if possible, upon the price to be paid for said property.

10. That about half past two o'clock, the said Mulvane came to the hotel, and thereupon, in the room occupied by your orators, negotiations were opened, at which time the said Mulvane expressed his willingness and ability to obtain by purchase the balance of the capital stock of said corporation, and to sell the entire property to your orators for the sum of five hundred thousand dollars. This sum your orators had deemed too large, and had previously offered him, the said Mulvane, four hundred and fifty thousand dollars. Finally, said sum was raised to four hundred and seventy-five thousand dollars, which was declined by the said Mulvane, and it was agreed that your orators were to meet Mulvane at five o'clock in the afternoon and would then determine if they should pay the sum asked by him, namely: five hundred thousand dollars, or not. At five o'clock p. m., your orators met at said Mulvane's office by appointment, and went into the private room attached to the bank adjacent his office, and there agreed to pay him the sum asked, namely: five hundred thousand dollars.

11. That no definite contract was then made between the said Mulvane and your orators for the reason that said Mulvane represented that he could not yet sign a definite contract, as he had not yet completed, and could not for some time, his arrangements to transfer the stock not owned by himself, but that he would take the matter under consideration and obtain the consent of his associate stockholders, and within ten days would send a memorandum of contract then prepared duly signed, and that your orators might then send theirs duly signed, or he would declare the trade off.

12. That at the expiration of said ten days, namely: on the 22nd day of November, 1889, he addressed to your orator George P. Wescott, the following letter:

"DEAR SIR: I cannot write you anything definite today; will write you again, or may see you, as I expect to be in Boston in the near future, and will advise you when I will go East soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE."

72 13. That your orator replied at once that they should be pleased to meet him, the said Mulvane, in Boston, any day he might name, and your orator George P. Wescott gave to the said Mulvane his address as the Parker house, Boston.

14. On December 4th, the said Joab Mulvane wrote to your orator, George P. Wescott, as follows:

"DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker.

My right arm is yet in limbo, and writing is a difficult task.

Respectfully yours, JOAB MULVANE."

15. On December 13th, your orator, George P. Wescott, received the following telegram dated in Boston:

"Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE."

16. Your orator, George P. Wescott, replied that he would meet him, the said Mulvane, in Boston on Saturday at eleven o'clock a. m., and accordingly at eleven o'clock a. m. he was at the Parker house and was there until 12.45 waiting for the said Mulvane to keep his appointment. At that time he came in and explained his delay, and thereupon, the said Mulvane and your orators, Hanson and Wescott, retired to room No. 304 on the second floor of the Parker house, where the said Mulvane stated that he now owned, in his own right, three hundred and eighty-eight thousand dollars of the capital stock of the Topeka Water Supply Company, leaving but twelve thousand dollars of the stock to be acquired, which he expected to have in a very few days, so that then he was in a position to sell and deliver the entire stock, except said twelve thousand dollars. That he had actually purchased the stock in his own name and now owned the same, but that it had cost him more money than he had expected, and he could not sell the stock at the price he had named, and that he should require at least fifty thousand dollars more than the price then named. That thereupon, considerable talk ensued, your orators insisting that while the said Mulvane had a perfect right to declare the transaction off, yet your orators understood it to be the agreement that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and inasmuch as he had carried it out and could accomplish it, your orators certainly felt that the sum which had been offered him at Topeka should be accepted by him and the stock delivered to them. That he had been acting as your orators' agent in acquiring the stock, and that it should be delivered to them.

73

17. Thereupon, after considerable negotiation, the said Mulvane intimated that twenty-five thousand dollars additional, or five hundred and twenty-five thousand dollars, was the very lowest sum at which he would sell the property, and would require fifty thousand dollars paid on account at the time of signing contract. That after further conserration, your orators retired from the room for a conference to see whether they should pay the twenty-five thousand dollars extra or not. Returning to the room, your orators informed Mulvane that five hundred thousand dollars was their best offer, and must be accepted upon that day. He absolutely declined to sell at any sum less than five hundred and twenty-five thousand dollars, and declared that all negotiations were off, but before leaving the room, the said Mulvane intimated that he would accept said propo-

sition, provided they would pay him the sum of sixty thousand dollars as a first cash payment for said stock, instead of fifty thousand dollars, as at first agreed upon.

18. That thereupon, after considerable negotiation and discussion, the following proposition and form of acceptance were drawn up, and the proposition was thereupon duly signed by the said Mulvane, and the acceptance was duly signed by your orators:

"BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000), to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided, that final payment of the last-named sum of one hundred thousand dollars may
74 be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE."

To Geo. P. Wescott, Samuel Hanson.

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON."

19. That it was the understanding of the parties at the execution of this contract that the more formal instrument mentioned in the proposition of Mulvane should be prepared for the signature of the parties on the following Monday morning.

20. Accordingly, your orators aver the fact to be, that on Monday morning, following, such contract was prepared and submitted to said Mulvane for any changes or suggestions that he might make with reference to it, not at variance with the terms of the agreement already entered into by the parties. That no valid or substantial objection was made to its terms, but the said Mulvane took said contract into his possession and put it in his pocket, and thereupon, after vain and repeated efforts upon the part of your orators to induce him to carry out the terms of said agreement by signing said formal contract and by carrying its provisions into effect, he announced that he was satisfied that your orators could not raise the

money and consequently he had determined to declare the whole matter off.

21. Your orators allege that they had made ample and abundant arrangement for the raising of the sum of money, and all sums required to be paid under said contract, and stood ready, and stand ready now, to carry out, to the minutest degree, the requirements of said contract and agreement. That they had a certificate of deposit from the Maverick National Bank of Boston, a copy of which is as follows:

75 "Capital, $400,000; surplus, $600,000.

Maverick national bank.

BOSTON, *December 17th*, 1889.

This is to certify that on the fourteenth day of December, 1889, through arrangements made with Samuel Hanson, I held for his account and on account of Geo. P. Wescott the sum of sixty thousand dollars ($60,000), to be paid to their order on demand.

J. W. WORK, *Cashier*."

Which said sum of money your orators stood ready to transfer at the National Bank of North America in the city of Boston, and which they stand ready to transfer now, and herewith tender to the said Joab Mulvane.

22. That the said defendant, Mulvane, kept the original form of agreement made in pursuance of the contract hereinbefore set out of the 14th day of December, and would not return it to your orators, but promised to do so as soon as he should have made a copy thereof. That he afterwards returned them what he asserted to be a typewritten copy.

23. That thereupon your orators prepared another form of agreement in strict conformity to the contract of December 14th, hereinbefore referred to, and duly executed the same by appending their signatures, and duly, through their solicitors, tendered the same to the said defendant, Mulvane, to be by him executed before the filing of this bill; and thereupon the said Mulvane refused to execute said formal agreement in compliance with the terms of the said contract, and refused in any way to perform said contract, and your orators hereby tender to the said Mulvane said contract to be executed.

24. That your orators are informed and believe that the said Mulvane sometimes pretends that he refused to perform said contract upon his part, or to go on further in the execution of his obligations in that behalf, because your orators are not able financially to carry out the terms of their said agreement; but your orators charge the fact to be that they and those whom they had associated with them in this agreement—and whom they had associated with them before entering into said agreement—are amply able financially to carry out said agreement, and to pay all of said sums of money promptly according to the terms thereof, and they are willing now to perform said agreement on their part, and herewith tender performance

thereof in accordance with the strict terms of said agreement, and demand performance upon the part of said Mulvane.

76 25. And your orators allege the fact to be, as against said pretense, that the said Mulvane has refused to perform said agreement because he had determined in his own mind to enter into certain negotiations and arrangements looking to the formation of another corporation, to wit: The Topeka Water Company, herein impleaded as a defendant, having at the time practical ownership of all of said property so as aforesaid sold and agreed to be conveyed to your orators, therein and thereby capitalizing said plant, franchises, and property at a sum largely in excess of that agreed to be paid by your orators, and thereby making a large profit unto himself over and above that which he would receive from your orators, to wit: the sum of two hundred and fifty or three hundred thousand dollars, and this after your orators' rights has accrued, to have said property duly conveyed to them under and by virtue of the terms of the contract aforesaid; and having in mind such arrangement, he alleged and pretended as an excuse therefor a belief—which your orators allege he did not entertain—that your orators were unable to carry out their agreement. But in any event such pretense upon the part of said Mulvane, your orators allege to be false and without foundation.

26. Your orators aver that in pursuance of the unconscionable and unlawful purpose hereinbefore referred to, and with the view of defeating your orators' rights, and with the view of preventing the enforcement of their contract according to its terms, the said Mulvane immediately returned to the city of Topeka and began the formation of the Topeka Water Company, and on the 28th day of December, 1889, he caused to be filed in the office of the secretary of state of the State of Kansas the charter of said The Topeka Water Company, the object and purpose of which was to construct, maintain and operate water works in the city of Topeka and the county of Shawnee, and at any and all other place or places in the State of Kansas; to buy, lease and operate water works in the city of Topeka and county of Shawnee, and at any and all other place or places in the State of Kansas, and to supply water for all public and private purposes in the city of Topeka and county of Shawnee, and at all other place or places. That the capital stock of said new corporation was fixed at one million five hundred thousand dollars, divided into fifteen thousand shares of one hundred dollars each.

27. That thereupon the said Mulvane applied to the mayor and council of the city of Topeka to pass a certain ordinance regranting the franchises, together with other franchises and privileges not mentioned in the first ordinance that had been previously granted

77 to the Topeka Water Supply Company, to the Topeka Water Company, and that, subsequently, and — pursuance of his, the said Mulvane's, request, an ordinance was passed; and thereupon, as your orators are informed and believe, without any grant authorizing them, the said The Topeka Water Company went into possession of the property and franchises of the said The Topeka Water

Supply Company, and is now operating said water works, plant and property, and collecting the tolls, incomes, rents and profits thereof.

28. That your orators are informed and believe, and therefore charge the fact to be, that the said Joab Mulvane and the said The Topeka Water Company are about to and are now engaged in attempting to negotiate bonds upon said water-works property and franchises, to the amount of one million five hundred thousand dollars, said bonds to be issued upon certification, after being duly executed, of the Atlantic Trust Company of New York, and that they are about to execute and place upon record a mortgage upon said property to the amount of one million five hundred thousand dollars, being the same property purchased by your orators under and by virtue of the agreement of December 14, 1889; that they are about to cause to be certified seven hundred and fifty thousand dollars of said bonds, and to place into the treasury of said The Topeka Water Company seven hundred and fifty thousand dollars of said bonds, to be employed in future extensions of said property.

29. And your orators allege, upon information and belief, that the said Mulvane and the said The Topeka Water Company have entered into negotiations with the said defendant, Coffin & Stanton, of New York, who are negotiators of and dealers in municipal securities in New York, to negotiate and sell the bonds aforesaid; and that the said Coffin & Stanton, in pursuance of said arrangement, have issued a certain circular, in substance setting out that said bonds are to be dated in 1890 and due in 1920, upon a trust deed, to be executed to the Atlantic Trust Company of New York, trustee; that the capital stock of said corporation, of which bonds are to be issued, is one million five hundred thousand dollars; that its authorized issue of bonds is one million five hundred thousand dollars; that seven hundred and fifty thousand dollars of said bonds are to be held by said trustee, to be issued upon future extensions, and one hundred and twenty thousand dollars held to retire the bonds of the Topeka Water Supply Company, and that six hundred and thirty thousand dollars of said bonds are to be offered upon the market for sale.

78 30. It is also stated in said circular that said company has a cash balance in its treasury of over fifty thousand dollars, and that the value of said works is eight hundred and fifty thousand dollars. That the present population included in the city limits of Topeka is estimated to be forty-five thousand. That the gross income of said works, as shown by experience, is seventy thousand, five hundred and ninety-five dollars and fifty-six cents per annum; operating expenses, eleven thousand, one hundred and ten dollars and eighty cents; net revenue, fifty-nine thousand, eight hundred and forty-eight dollars and seventy-six cents; interest charges on bonds proposed to be issued, forty-five thousand dollars; surplus revenues, fourteen thousand, eight hundred and forty-eight dollars and seventy-six cents.

31. That your orators are informed and believe, and therefore charge the fact to be, that the said The Topeka Water Supply Company is about to execute a deed of conveyance of its property and franchises to the said The Topeka Water Company, and that the

said The Topeka Water Company is about to execute a mortgage, or deed of trust, to the said The Atlantic Trust Company, and the said Joab Mulvane, as president of both of said companies, is about to execute and deliver the negotiable paper provided for in said mortgage, or deed of trust, and to sell the same to innocent purchasers, and thereby to incumber the property so as aforesaid contracted to be sold and delivered to your orators under and by virtue of the contract of December 14, 1889, and will certainly do the things aforesaid unless prevented and restrained therefrom by order of this court.

32. That the said The Atlantic Trust Company, acting upon behest of said The Topeka Water Company, is about to certify and issue said bonds, and said Coffin & Stanton are about to negotiate and place said bonds upon the market, and will do so unless restrained therefrom by order of this court, all of which actings and doings are against equity and good conscience, and are in manifest wrong of your orators, and will work upon your orators irreparable harm and injury.

33. That your orators are informed and believe, and so charge the fact to be, that if the stock of the Topeka Water Company has been certified, and any of said stock is in the hands of persons, incorporators and forming and acting as directors, or other persons than directors, of the said The Topeka Water Company, that all of said persons hold said stock at the request, and for the benefit and to the use of the said Joab Mulvane, or parties in interest with him; or, if otherwise, that they have not paid valid consideration for said stock and are not *bona fide* purchasers thereof.

79 34. That these persons, whomsoever they be, are unknown to your orators, but your orators pray that they may be made parties to this bill, and their rights subjected and decreed to be inferior and subordinate to the claims of your orators in this behalf.

35. Forasmuch, therefore, as your orators are without remedy at the common law, but can only have adequate relief in a court of equity, wherein matters like the foregoing are properly cognizable and relievable, your orators pray that a receiver may be appointed of said water works, plant and franchises, who shall take the same into his possession and hold, manage and operate the same, and collect the rents, issues and profits thereof under the direction of this court, and hold said rents, issues and profits to abide the further order and direction of the court.

36. That the said Joab Mulvane, the Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained, pending this suit, from carrying out the schemes and purposes aforesaid; from putting upon record any deed of conveyance or mortgage; from signing, sealing and negotiating any such bonds as are described in the circular of said Coffin & Stanton, or in anywise incumbering, conveying or otherwise disposing of the title to said water works and franchises, or any part thereof.

37. That the said Coffin & Stanton be enjoined from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water com-

panies, and the said Joab Mulvane individually, be enjoined and restrained from further carrying out said negotiations or delivering said bonds, or executing said bonds, or putting said bonds upon the market, or from requesting said trustees to certify the same, or from requesting said trustees to act in any manner in connection with said scheme or enterprise looking to the formation of the Topeka Water Company, and its requirements of said franchises, or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on its said negotiations; and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company, or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or
80 from anywise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises as aforesaid.

38. And your orators further pray that said contract of December 14, 1889, may be specifically performed. That the said Joab Mulvane be ordered and directed to deliver up to the National Bank of North America the stock sold by him on said 14th day of December, 1889, to your orators, assigned by him in blank, and that upon payment being made as provided in said contract, and upon the terms and in conformity to the decree to be entered in that behalf, your orators shall be entitled to receive and own said stock, and to enjoy all the rights and privileges of ownership of said stock, to wit, ownership of the property and franchises of the said The Topeka Water Supply Company in its entirety, as the same stood and existed at the date of entering into said contract aforesaid.

39. But your orators pray that in the event that said Joab Mulvane has, by his actings and doings aforesaid, and by intermediate rights accrued and invested, prevented himself from the due performance of said contract, that all of the rights, privileges and benefits held and derived by said Mulvane from and under said contract aforesaid in dealing with the property so as aforesaid sold to your orators, and of all other claiming by, through or under him, shall be held to be trustees of your orators for and on account of any rights, benefits or property thereby received and growing out of said transaction.

40. Your orators further pray that said receiver hereinbefore prayed for, may be ordered and directed to take into his possession the said water-works pumping station, wells, tools, plant of every description, water mains and franchises, moneys, books, accounts and everything appurtenant or belonging to said water works, and to hold and operate the same in conformity to the duties and obligations of the said The Topeka Water Supply Company under and by virtue of its charter and the ordinances of the city of Topeka in that behalf enacted, and to collect the tolls, revenue, incomes and profits of all said property and hold the same as aforesaid.

41. And your orators further pray that upon a final hearing of the matters and things hereinbefore set out, that your orators may decree upon payment as aforesaid—which is herewith tendered—to be the owners of the entire capital stock of the said The Topeka Water Supply Company, and that the said The Topeka Water Supply Company has no right, claim or incumbrance upon said property or franchises of the said The Topeka Water Supply Company in
81 contravention of or against the rights of your orators, as aforesaid, and that the injunction hereinbefore prayed for may be made perpetual.

42. And if it shall be found that the said The Topeka Water Supply Company has prior to the commencement of this suit, made due conveyance of its rights and franchises to the said The Topeka Water Company, then your orators pray that the said The Topeka Water Company may be held to be the trustee of your orators for and on account of all things whatsoever so as aforesaid received by said conveyance, and that your orators be the holders of the capital stock of the said The Topeka Water Company, and for such other and further relief as may be conformable to equity and good conscience, and to this honorable court shall seem meet.

43. And may it please your honors to grant unto your orators the most gracious writ of subpœna, issued out of this honorable court and directed to the marshal, to be served upon the said Joab Mulvane, personally, and upon the said The Topeka Water Supply Company and the said The Topeka Water Company. And as the said Coffin & Stanton and the said Atlantic Trust Company are non-residents of this district, but live in the city and State of New York, your orators pray that an order be made directing service of a chancery subpœna upon them at their places of residence, and upon the party in possession of said property, commanding said defendants, and each of them, at a certain day and under a certain pain, to be and appear before this honorable court, and then and there true, direct and perfect answer to make to all and singular the premises (but not under oath, answer under oath being hereby expressly waived) and further to stand to, abide and perform such other and further order and direction as may be conformable to equity and good conscience and to this honorable court shall seem meet.

And your orators will ever pray.

ROSSINGTON, SMITH & DALLAS,
Complainant's Solicitors.

W. H. ROSSINGTON, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Charles B. Smith, being first duly sworn, on oath says that he is of counsel for the above complainants; that he has read the foregoing bill of complaint, and knows the contents thereof, and
82 that the statements therein contained are true, except such statements as are made upon information and belief, and as to all such, he believes them to be true.

And further, affiant saith not.

CHAS. B. SMITH.

Subscribed and sworn to before me this 5th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

Com. expires Feb. 15, 1893.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Bill. Filed Feb. 5, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, sol'rs for compl't, Topeka, Kansas.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and present to the court their bill of complaint, duly verified, and make application to the court for a temporary injunction, and it appearing to the court that no notice of such application has been made by said complainants—

It is, thereupon, ordered and directed that said application be set down for hearing on the 12th day of February, 1890, at 10 a. m., at the court-room, Topeka, Kas., and that said defendants be notified of said application by service of this order.

And it is further by the court ordered that in the meantime the said defendants, and each of them, their agents, attorneys, servants and employés, and all persons acting for or under said defendants, or either of them, be restrained from carrying out the schemes and purposes in said bill alleged.

That the said Joab Mulvane, The Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained from putting upon record any deed of conveyance or mortgage; from signing, sealing or negotiating any such bonds
83 as are described in the circular of said Coffin & Stanton, in said bill of complaint set forth, or from in anywise incumbering, conveying or otherwise disposing of the title to said water works, and franchises or any part thereof.

That the said Coffin & Stanton be enjoined and restrained from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water companies, and the said Joab Mulvane, individually, be enjoined and restrained from further carrying out said negotiations, or delivering said bonds, or executing said bonds, or putting said *said* bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any manner in connection with said scheme or enterprise, looking to the formation of the Topeka

Water Company, and its acquirement of said franchises or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on said negotiations, and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or otherwise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises, aforesaid.

C. G. FOSTER, *Judge*.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Restraining order. Filed *Feb. 5*, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, *compl'ts' sol'rs*, Topeka, Kansas.

Chancery Subpœna.

UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

The United States of America to Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcette Street, partners as Coffin & Stanton, and the Atlantic Trust Company, Greeting:

We command you and every of you, that you appear before our judge of our circuit court of the United States of America for
84 the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of March next, to answer the bill of complaint of George P. Wescott and Samuel Hanson, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of To-
[SEAL.] peka, in said district, this fifth day of February, in the year of our Lord one thousand eight hundred and ninety.

GEO. F. SHARITT, *Clerk*.

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*.

No. 6448. Circuit court United States, district of Kansas. George P. Wescott and Samuel Hanson *vs.* Joab Mulvane *et al.* Chancery subpœna. Returnable to rule day, first Monday in March, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Filed Feb'y 5th, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Rossington, Smith & Dallas, comp'ts' sol's.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ Feb'y the 5, 1890, and executed the same as follows, to wit: Served on the within-named defendant, Joab Mulvane, at Shawnee Co., State & district of Kansas, Feb'y 5th, 1890, by delivering to him personally a true & certified copy of this writ, with all indorsements thereon, and served same on the Topeka Water Supply Co. at said county, State and district Feb. 5th, 1890, by delivering a true and certified copy of this writ, with indorsements thereon, personally to Joab Mulvane, said Joab Mulvane being then and there the president of said defendant, The Topeka Water Supply Co., and served same on within-named The Topeka Water Company at county, State and district aforesaid, Feb. 5th, 1890, by delivering personally to Joab Mulvane a true and certified
85 copy of this writ, with all indorsements thereon, said Joab Mulvane being then and there president of said defendant, The Topeka Water Company, and after diligent search have been unable to find the other within-named defendants in my district or any place of residence of said defendants.

R. L. WALKER,
U. S. Marshal.
By L. D. DE BOST, *Deputy.*

Service $6.00.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and present to the court their bill of complaint, duly verified, and make application to the court for a temporary injunction, and it appearing to the court that no notice of such application has been made by said complainants,

It is, thereupon, ordered and directed that said application be set down for hearing on the 12th day of February, 1890, at 10 a. m., at the court-room, Topeka, Kansas, and that said defendants be notified of said application by service of this order.

And it is further by the court ordered that in the meantime the said defendants, and each of them, their agents, attorneys, servants and employés, and all persons acting for or under said defendants, or either of them, be restrained from carrying out the schemes and purposes in said bill alleged.

That the said Joab Mulvane, the Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained from putting upon record any deed of conveyance or mortgage; from signing, sealing or negotiating any such bonds as are described in the circular of said Coffin & Stanton, in said bill of complaint set forth, or from in anywise incumbering, conveying or otherwise disposing of the title to said water works and franchises, or any part thereof.

86 That the said Coffin & Stanton be enjoined and restrained from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water companies, and the said Joab Mulvane, individually, be enjoined and restrained from further carrying out said negotiations, or delivering said bonds, or executing said bonds, or putting said *said* bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any manner in connection with said scheme or enterprise, looking to the formation of the Topeka Water Company, and its acquirement of said franchises or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on said negotiations, and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company, or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or anywise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises aforesaid.

C. G. FOSTER, *Judge*.

Indorsed: No. 6448. Restraining order. Filed Feb. 5, 1890. Geo. F. Sharitt, clerk.

Received this order February 5th, 1890, and served same on the within-named defendant, Joab Mulvane, at Shawnee Co., State and dist. of Kansas, at 3.00 p. m., by delivering to him personally a true and certified copy of this order with all indorsements thereon, and served same on within-named The Topeka Water Supply Co., at county, dist. & State aforesaid by delivering a like copy of this writ as aforesaid to Joab Mulvane personally at 3 o'clock p. m. Feb. 5, '90, the said Joab Mulvane being then and there president of the defendant The Topeka Water Supply Company and served same on the within-named The Topeka Water Company at State, county & dist. aforesaid by delivering a like copy of this writ, as aforesaid, at 3

o'clock p. m., Feb. 5th, 1890, personally to Joab Mulvane, the said Joab Mulvane being then and there president of said defendant, The Topeka Water Co. and after diligent search I have been unable to find the other within-named defendants or any place of residence of said defendants in my district.

R. L. WALKER,
U. S. Marshal.
By L. D. DE BOST, *Deputy.*

Service, 6.00.

87 In the Circuit Court of the United States, District of Kansas.

SAMUEL HANSON and GEORGE P. WESCOTT, Complainants,)
vs.
JOAB MULVANE *ET AL.*, Defendants.)

STATE OF KANSAS,)
Shawnee County,) *ss:*

E. M. Shelden, being first duly sworn, deposes and says that he is treasurer of the Kansas Loan & Trust Company, of Topeka, Kansas.

That the said The Kansas Loan & Trust Company received from C. C. Domett, assistant cashier of the Maverick National Bank of Boston, Massachusetts, a letter dated the 17th day of January, 1890, enclosed with which letter was a sealed envelope addressed to Joab Mulvane. That such envelope was presented to said Joab Mulvane, which he refused to accept, saying that it could be sent to him through the United States mail. That on the 22nd day of January, 1890, said affiant wrote to C. C. Domett the letter hereto attached to this affidavit, and marked "Exhibit A" and made a part hereof.

E. M. SHELDEN.

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

My commission expires February 15, 1893.

Directors: John R. Mulvane, T. B. Sweet, Thos. A. Reed, Geo. M. Noble, E. M. Shelden.
Boston office, 153 Devonshire street.
Philadelphia office, Keystone national bank building.
Menzies, Coventry, and Black, Edinburgh, agents.

Paid up capital, $600,000.00.

The Kansas Loan & Trust Co., Topeka, Kansas.

Incorporated in March, 1873, for negotiating loans upon real estate and acting as trustee for estates and individuals. Loans negotiated exceed $20,000,000.

TOPEKA, KANS., *Jan. 22d*, 1890.

C. C. Dorrett, Esq., assist. cashier Maverick nat'l bank, Boston, Mass.

DEAR SIR: Herewith I return you the letter inclosed in yours of the 17th inst. to Mr. Joab Mulvane, as he declines to accept the same. He says it can be sent to him by the United States mail.

Yours truly, E. M. SHELDEN, *Treasurer.*

88 Indorsed: No. 6. Letter from the Kansas Loan & Trust Co. Returning letter of Symonds & Libby, attorneys, unopened.

In the Circuit Court of the United States, District of Kansas.

SAMUEL HANSON and GEORGE P. WESCOTT, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

STATE OF KANSAS, *Shawnee County*, } *ss:*

Chas. B. Smith, being first duly sworn, deposes and says that he is one of the solicitors for the complainants in the above-entitled action.

That on the 3rd day of February, 1890, there was received at the office of Rossington, Smith & Dallas, Topeka, Kansas, a package of papers from the said complainants, being the original papers referred to in their bill of complaint herein, and also a letter which is attached to the affidavit of E. M. Shelden, filed in this case. That pinned to said letter was the envelope hereto attached and marked "Exhibit A," and made a part hereof. That said envelope at that time was sealed and had endorsed thereon the endorsement appearing upon the same. That said envelope remained sealed until the 11th day of February, when the same was opened by said affiant, and when so opened said affiant took from it a letter directed to Joab Mulvane and signed by Joseph W. Symonds, which is hereto attached and marked "Exhibit B," and made a part hereof.

CHAS. B. SMITH.

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

My commission expires February 15, 1893.

Mess. Rossington, Smith & Dallas:

This letter was sent to Kansas Loan & Trust Co. to deliver to Joab Malvane, which said Mulvane declined to receive, and the same was returned to Maverick bank, unopened. I authorize you to open the same that you may see we promptly notified him of our proposed claims.

GEO. P. WESCOTT.

Jan'y 28, '90.

Indorsed: Joab Mulvane, Esq., Topeka, Kansas.

(If not called for in 5 days, return to Symonds & Libbey, Portland, Me.)

Opened by Chas. B. Smith, Feb'y 11th, '90.

89 Symonds & Libbey, counsellors-at-law, Portland, Me.

PORTLAND, ME., *Jan.* 14, 1890.

Jacob Mulvane, Esq., Topeka, Kansas.

DEAR SIR: Hon. George P. Westcott, of this city, has left with me for enforcement, a certain memorandum containing an offer of sale of the entire stock of the Topeka Water Supply Company, signed by you, and dated December 14th, 1889, which said offer was duly and formally accepted by Mr. Wescott and Mr. Samuel Hanson, of Boston, to whom it was made. The matter has been delayed on account of the illness and death of Mr. Wescott's sister, and also the serious illness of Mr. Wescott himself, he being confined to his room at present, but he desires that some action be taken in the premises without further delay.

I have advised Mr. Wescott that, in my judgment, there is no doubt that the offer of sale and acceptance above referred to, and dated December 14th, forms a complete and valid agreement for the sale of the stock of the Topeka Water Supply Company upon the terms therein stated, and such an agreement that its specific performance can be compelled by proper proceedings in a court of equity.

Mr. Wescott and Mr. Hanson stand ready, upon the signing of the agreement mentioned in the memorandum of sale, to make good their payments as therein stated, and to perform everything required of them to meet your written proposition, as they have already stated to you at the time of their personal interviews with you. They desire that the contract be carried out according to its terms, in good faith, and I am instructed to take such steps as may be necessary to enforce their rights.

As their attorney, therefore, and in their behalf, I take this opportunity to inform you of their present readiness and ability to make the payments required by your written proposition of December 14th, which was accepted by them, and to do all that is required of them by said contract, and I wish hereby to make a formal demand upon you for the execution of the new agreement and delivery of the stock

at the National Bank of North America in Boston, as contemplated by said agreement of December 14th.

Very truly yours, JOSEPH W. SYMONDS.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al.* vs. Joab Mulvane *et al.* Affdt. of E. M. Shelden & Chas. B. Smith. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

90 *Affidavit of Joab Mulvane.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Plaintiffs,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

STATE OF KANSAS, } ss:
County of Shawnee, }

Joab Mulvane, of lawful age, being first duly sworn, deposes and says that he is the Joab Mulvane named as one of the defendants in the above-entitled cause; that he is acquainted with the above-named complainants, George P. Wescott and Samuel Hanson; that he became acquainted with said complainants in the city of Topeka, in the State of Kansas, in October and November, 1889. The affiant further says that he is and was at all the times hereinafter mentioned, president of the Topeka Water Supply Company, a corporation duly created and existing under the laws of the State of Kansas, and also a stockholder therein; that said complainant, Samuel Hanson, came to this affiant in Topeka some time during the month of October, 1889; or early part of November, 1889, and desired to know from this affiant whether the stock of the Topeka Water Supply Company was for sale or not, and if so upon what terms. This affiant then informed said Hanson that he did not know whether the stock of said company was for sale or not, or upon what terms, if any, the same could be acquired.

This affiant further says that afterwards, in the month of November, 1889, said complainants, both Wescott and Hanson, came to this affiant at his office in the city of Topeka, with propositions for the purchase of either a majority or all of the stock of said Topeka Water Supply Company; but this affiant refused to enter into any contract with said complainants at that time for the sale of any or all of said stock. And this affiant further says that at said time in November, he declined to make said complainants any proposition for the sale of any or all of said stock, and declined to consider all and every the propositions made by said complainants at that time for the purchase of said stock; that afterwards, affiant notified said

complainant Wescott that he expected to be in Boston
91 a certain time, and did go to Boston, and was there on th
14th day of December, 1889, and met said complainants at th
Parker house in said city; that negotiations were had for the sale
all of said stock of said Topeka Water Supply Company; that du
ing said negotiations, affiant told complainants that he was not th
owner of all of the stock of said corporation, and did not know ho
long it would take him to get all of said stock, and only had ther
with him, about three hundred and ninety shares of said stock; tha
he was willing to enter into a contract with them for the sale of a
of the stock, provided, a sufficiently large amount was paid dow
cash in advance, to assure him of the good faith and ability of th
proposed purchasers, and that they would carry out their contract
and he could have sufficient time to obtain control of the balance o
the stock which he then did not have; that after considerable talk
and late in the afternoon of said December 14th, affiant made said
complainants a proposition. One of said complainants, at his own
instance, after affiant had made a proposition, wrote down the propo
sition in substance as set out in complainants' bill, and asked affiant
to sign it, which he did; and thereupon, one of said complainants
wrote the acceptance of the same and said complainants signed said
acceptance. At the time of the making and acceptance of said propo
sition, it was understood and agreed that the complainants and affiant
should meet on the following Monday, to agree upon and execute a
contract for the sale of said stock. Said proposition and acceptance
were signed on December 14th, just before the parties separated for
that day. Said Wescott desired to go to Portland that evening and
not return till about 1 o'clock p. m. of the following Monday. Said
Hanson, before they separated, volunteered to block out a contract
and meet affiant at 10 o'clock on Monday, and suggested that per-
haps he and affiant could agree upon a contract before or by the time
said Wescott should arrive. It was the understanding of this affiant
at the time, and affiant believes was also the understanding of said
complainants at that time, that said proposition and acceptance was
only to be regarded as preliminary negotiations, which it was then
expected would terminate in a binding contract on the following
Monday, but which was not to become of binding effect until a
definite and complete contract for the sale of said stock, embodying
all necessary details, should be agreed upon and executed. Prior to
the signing of said proposition affiant had distinctly told complain-
ants that they must rely upon his responsibility to carry out any
contract that he might enter into, and referred them to Mr. I. F.
Barr, of Boston, and told them they could look up his financial
standing. During the negotiations of December 14th as to im-
92 mediate delivery of said shares of stock was at the time con-
templated. Such immediate delivery being, and being known
to said complainants to be an impossibility, and the placing of said
shares of stock in the bank at once was not at that time contemplated
by either of said parties, nor it was the understanding and meaning
of said affiant when said negotiations were being had, that he would
not be required to deliver any shares of stock to complainants until

money sufficient to pay for all of said stock had been placed in the bank, but that said complainants were to rely upon his contract and agreement and financial responsibility to comply with the terms of any contract he should make. There was no agreement or understanding as to when the shares of stock should be placed in the bank, but it was understood that it was impossible for affiant to place all of said shares there at once, and not for some time.

Affiant further says that on Monday following, being December 16th, 1901, said complainant Hanson came to him at the Parker house, in said city of Boston, about 11 o'clock a. m. of said day, but did not present any draft of contract, and affiant asked said Hanson if he had brought a contract with him. Said Hanson replied that he had not, and asked this affiant if he would go with him to see Mr. Potter, president of the Maverick bank. Affiant thereupon asked said Hanson what he wanted him to go to see said Potter for, and Hanson replied: "Why, about this matter." Affiant thereupon told said Hanson that he did not know Mr. Potter, and did not have any business with him that he knew of, and declined to go to see said Potter, and said that he did not want to negotiate with any other parties in respect to the matter; and thereupon this affiant asked Mr. Hanson to produce his contract, if he had one; to which said Hanson replied that he and Mr. Wescott would come around in the afternoon about 1 o'clock. Thereupon said Hanson went away, and in the afternoon between 1 and 2 o'clock said Hanson and said Wescott called upon this affiant at said Parker house, and thereupon affiant asked said Wescott and Hanson if they had a contract to present to him; and thereupon they presented a form of contract, a copy of which is hereto attached marked "Exhibit A," the original of which this affiant is ready to produce in court. Thereupon this affiant read over said contract carefully, and after reading the same stated to said complainants that he objected to signing the form of contract presented for the reason that it was at variance with the proposition and contained provisions that he could not and which they knew he could not comply with; and affiant also then told said parties that if he did sign such a contract they would not pay him any money, and that he considered it an unfair contract and that they were
95 trying to take advantage of him and get him to sign a contract which would be binding upon himself but not upon them, and that they knew that he could not deliver the stock at once and did not even control or possess all the stock and knew not how long it would take him to get it. Affiant asked them if they had inquired of Mr. Bacon as to his ability to carry out a contract. Affiant had told said complainants that they must rely upon their contract with him, and referred him to Mr. I. F. Bacon as to his ability to carry out a contract that he might make, and asked them if they had seen Mr. Bacon and what he said about affiant being able to carry out a contract. Complainants answered that they had seen Mr. Bacon, and that Mr. Bacon told them that he would as soon trust money to affiant as any man that ever came into his bank, but that he could not guarantee affiant's life or that affiant would live to deliver this stock, in which case they said they might have a lawsuit

on their hands. Affiant said that he had told said complainants definitely from the beginning that they were to rely upon the contract which affiant made, if one was made, and told them that he had never asked Mr. Burr to guarantee his life or the delivery of the stock, and told them if they found affiant to be financially responsible and reliable, that a contract could be enforced against his successors if he should die; that he would not sign any contract which did not give him sixty thousand dollars in cash, nor would he sign a contract which they knew and which affiant knew he could not comply with. Complainants then insisted and at all times insisted that affiant should sign a contract binding himself to at once place in the hands of the cashier of the National Bank of North America, the certificates representing the entire capital stock of the Topeka Water Supply Company, indorsed in blank. The contract as originally presented to affiant, did not contain the erasures or pencil interlineations as now shown by said form of contract. During the discussion that followed the presentation of the form of contract the complainants made the erasures and interlineations as now appear upon said contract, and would make no others. The said interlineations and erasures were made after the objection to the contract by this affiant, and were not made upon any suggestion of this affiant; that with such erasures and interlineations the contract would be satisfactory to him. Complainants insisted upon this contract as they had changed it. Said complainants did not on said day tender any other contract to this affiant, but during all the time insisted upon this affiant signing said contract with such changes and interlineations as are shown upon the copy hereto attached, and refused to make, execute or accept any other form of contract
94 than the one tendered by them; that at no time during said Monday or at any other time, did the said complainants tender the sum of sixty thousand dollars or any other sum to this affiant. Affiant told them that he did not believe they had any money, and that they did not intend to pay him any money, and that they were urging upon him a contract which would not give him any money, and that he did not believe that they had any money, and that money was very tight in Boston, and that they had not convinced him in any way or by any evidence that they had a dollar or were willing to give him a dollar. This discussion continued the afternoon until dusk, about three hours. Affiant after considerable discussion, told said complainants that he would spend no more time negotiating with them, that they had declined and refused to pay him any money, and insisted upon a contract which they knew and he knew could not be complied with and which would be binding upon him and not upon them. Thereupon said complainants said let us sleep over this thing, and we will meet you tomorrow. Affiant told them that he would not meet them tomorrow; that he withdrew all propositions, and that all previous negotiations are wiped out, but that if they had a new proposition to make, they could make it in black and white and address him over Bullard Bank at Seattle Reservation; affiant left Boston on Tuesday the 17th,

and went to New York to see whether he could not negotiate the stock, affiant being desirous of disposing of said stock.

Affiant further says that all times during the pendency of said negotiations, and until he declared the same off, he was willing and ready to sell said stock for the price and upon the terms of payment provided in said proposition, and was ready and willing and would have carried out and complied with the spirit and intention of the negotiations of December 18th, had said complainants been also willing to do the same, and had not affiant became convinced that they were seeking to get an advantage of him.

And affiant further says that neither of said complainants nor any one for them, have since said day, at any time offered to make any contract with said affiant for the purchase of said stock, or tendered said affiant any money as part payment therefor until the present time, unless such a contract was tendered by Mr. C. B. Smith, one of complainants' solicitors, which tender, if any was made by said Smith presenting a paper to this affiant about an hour before the service of the restraining order in this suit, which paper said Smith asked this affiant to sign; but this affiant does not know the contents of said paper, and refused to examine or sign the same, said affiant having sold all of said stock long prior to said paper being presented by said Smith.

95 And affiant further says that after said negotiations had been declared off, he went to New York on the 17th of December, 1889, for the purpose of trying to sell said stock, and while there on or about the 18th day of December, 1889, sold all of said stock to the firm of Coffin & Stanton of the city of New York and Woodbury and Moulton, partners doing business in the city of Portland in the State of Maine. And affiant further says that the said firm of Woodbury & Moulton consist of William H. Moulton, Theo. C. Woodbury and Edward H. York; that each of the members of said firm of Woodbury *and* & Moulton are citizens and residents of the city of Portland and State of Maine, and are and *was* as aforesaid, residents and citizens of the same State of which the said complainant, George P. Wescott, is and was a resident and citizen at the time of the commencement of this action; that said sale was made by this affiant to said two firms in good faith, and said parties paid to this affiant as part payment on said sale, the sum of fifty thousand dollars in cash, and it was then and there agreed that the balance of said purchase-moneys should be paid and the said stock should be delivered on the 10th day of February, 1890.

Affiant further says that the Topeka Water Company was organized through his efforts wholly at the request and for the benefit of the purchasers of said stock, as they were desirous of having the franchises and property in connection of a corporation with a greater capital stock than provided for by the charter of the Topeka Water Supply Company.

And this affiant further says that at the suggestions of the purchasers of said stock, he used his efforts in procuring the passage of an ordinance by the city council of the city of Topeka authorizing the conveyance of the privileges and franchises heretofore granted to

the Topeka Water Supply Company by said city of Topeka to the Topeka Water Company; that such ordinance was passed and accepted, and a conveyance was made and duly executed by said Topeka Water Supply Company, conveying all of its property and all of the rights and franchises granted it under the ordinances of the city of Topeka, to the Topeka Water Company. A copy of said deed is filed in the office of the clerk of said city of Topeka, all of which was done prior to the commencement of this suit, affiant having no knowledge of the intention to commence such suit.

Affiant further says that he has no interest in the Topeka Water Company, excepting in so far as he has acted in procuring the organization of said company for the benefit of the purchasers of the stock of the said Topeka Water Supply Company, as heretofore stated. And further affiant sayeth not.

JOAB MULVANE.

96 Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] GEO. F. SHARTT, *Clerk.*

"EXHIBIT A."

The Brunswick, Barnes & Dunklee, Boston.

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Sam'l Hanson, of Boston, Mass., party of the second part.

The said party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each for the sum of five hundred thousand dollars. The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th day of February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th of March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th Feb'y. The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company before named, which certificate indorsed shall be transferred in blank. It being the intention of this agreement that the said stock shall be delivered and paid for at the said National Bank of North America. The party of the second part

also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees [(that the party of the second part shall receive all monies or incomes from any source to which the Topeka Water Supply Company may be entitled from the first day of January, 1890, and)]*
97 that said corporation shall be turned over to said party of the second part after full payment for said stock (on the first day of Jan'y, 1890), free from all debts and encumbrances of every kind, except the funded debt consisting of one hundred & twenty thousand first-mortgage bonds.

Verbatim ad letteratim,
Attest:

D. W. MULVANE.

Indorsed: No. 6448. Affidavit of Joab Mulvane. Filed Feb. 12, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

STATE OF KANSAS, *Shawnee County,* } *ss:*

Joab Mulvane, of lawful age, being first duly sworn, deposes and says, that it is not true as stated in the affidavit of said complainant Wescott, that the paper presented by said complainants at Topeka was satisfactory to this affiant, and affiant says that he did not assent to or in any manner agree to the proposition contained in said paper, and that he did not say to said complainants that he would in ten days, send them the said paper signed by him or declare the trade off, but on the contrary said affiant says that at the time he declined to consider all and every the propositions made by said complainants; that it is not true as stated in the affidavit of said Wescott that affiant did not make any further objections to the contract as submitted, except with reference to the taking possession of the company by said complainants, but, on the contrary, he objected to said contract as stated and set forth in his previous affidavit.

Affiant further says that he has no recollection of being shown at any time a letter, a copy of which is set out in the affidavit of said Wescott, or of reading any such letter, and says that he did not make the statement that the recommendation therein contained was certainly good enough to show that they were acting in good faith throughout, as affiant did not believe at the time said statement is claimed to have been made that they were acting in good faith.

[* Words and figures enclosed in brackets erased in copy.]

Affiant further says that said Hanson did not refer this affiant to the Maverick bank or to any person in regard to his ability
98 to perform a contract. That neither of the complainants told affiant that Mr. Potter was one of the parties in interest and never told affiant who their associates were, if they had any.

Affiant says that during these negotiations in Boston he found, by examining the city directory of Boston, that said Hanson was a bond clerk in the Maverick bank, and affiant says that he did not say to said Hanson that his reason for asking a price in excess of five hundred thousand dollars was that he had not bought a single share of the stock for which he had not paid more than par, or anything in substance to that effect.

Further, affiant says that it is not true that he declined to discuss the contract, but says that said contract was under discussion all of Monday afternoon, December 16th, 1889, and that such changes as were made were made after objections by affiant, and that complainants refused to make other and important changes that affiant insisted upon, particularly with reference to placing the shares of stock in the bank at once, and further saith not.

JOAB MULVANE.

STATE OF KANSAS,)
Shawnee County,) ss:

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] ALFRED G. BASS,
Notary Public.

Commission expires July 20, '93.

Indorsed: No. 6448. Affidavit of Joab Mulvane. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

PORTLAND, ME., *Dec. 17th*, 1889.

I, Geo. P. Wescott, of Portland, Maine, make the following statement in regard to the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Company, Topeka, Kansas. Said negotiations being conducted on the one side by said Mulvane, owning, in his own right, more than a majority of the capital stock of the Topeka Water Supply Company (capital stock of said company being $100,000,) and on the other side by Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts.

On the twelfth day of November, in the afternoon, myself and Mr. Hanson were at the office of Mr. Mulvane, in Topeka, Kansas, pursuant to an arrangement made between said Mulvane and
99 Hanson some three or four weeks prior to this date. We found Mr. Mulvane at his office and obtained from him his consent to make such examination of the plant and the works of the company as we desired to make.

On the following day it was arranged to meet Mr. Mulvane in the morning and examine the books of the corporation and later to enter into negotiations for the purchase of the plant. Accordingly we

visited the pumping station, on the banks of the Kansas river and made an inspection of the entire city, as we deemed desirable and proper, relating to the standing of the affairs of this corporation.

On the following morning we met Mr. Mulvane and went with him to examine the books of the corporation at the office of the water company. Finding everything in satisfactory condition it was arranged to meet Mr. Mulvane at the hotel after dinner and see if we could agree on the price to be paid for the property. At about half past two Mr. Mulvane came to the hotel, with Mr. Shaw (in the employ of the company). Mr. Shaw having been brought to the hotel at our request, to interview him in regard to the pipe distribution of the company, of its condition, etc. After Mr. Shaw had left the room, negotiations were opened with Mr. Mulvane, at which time Mr. Mulvane expressed a willingness to undertake the purchase of the balance of the capital stock and sell the entire property to us for the sum of $500,000. This sum Hanson and myself deemed too large, and had previously offered him $450,000. Finally this sum was raised to $475,000, which was declined by Mr. Mulvane, and it was agreed that we were to meet Mr. Mulvane at 5 o'clock in the afternoon and would then determine if we would pay the sum asked by him, namely, $500,000, or not.

At 5 p. m. we met at his office by appointment and went into a private room attached to the bank, adjoining his office, and there we agreed to pay him the sum asked by him, namely, $500,000. With that object in view, the following memorandum was prepared for signatures of the parties, which was satisfactory to Mr. Mulvane:

Copy.

Joab Mulvane, prst.; M. O'Brien, sec't'y.

The Topeka Water Supply Company. Office, 111 East Seventh street.

TOPEKA, *Nov.* 13, 1889.

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his associates, own the stock of the Topeka Water Supply Company, said Mulvane owning, in his own right, a majority thereof, and being disposed to sell his stock and to advise his associates to sell their stock in said company, on the terms and conditions hereinafter stated; and whereas, Geo. P. Wescott, of Portland, and Samuel Hanson and associates desire to purchase the capital stock and property of said water company.

It is hereby agreed that said Wescott and Hanson will pay said Mulvane and associates par for said stock and to pay to Joab Mulvane, Esq., the further sum of one hundred thousand dollars for the control and carrying out of the above sale and transfer of said stock to said Wescott and Hanson, delivery thereof to be made in New York or Boston, as said Mulvane may elect. Said Mulvane, on his part, agrees to deliver said stock, amounting to $400,000, par value, on or before January 1st, 1890, also to perform such services in formation

of a new company, if one is required, to be performed as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON. [SEAL.]

The foregoing agreement was written out in duplicate, we expecting that Mr. Mulvane would sign one and we the other. We signed ours, as the signatures appear above; but Mr. Mulvane said he could not then sign a paper which bound him to do something which he did not know if he could do or not, but that he would take the matter under consideration and at once obtain the consent of his associates and within ten days he would send us his paper, duly signed, and we might return ours duly signed, or he would declare the trade off.

At the expiration of said ten days, namely, November 22nd, he addressed the following letter to me:

DEAR SIR: I cannot write you anything definite today. Will write you again, or may see you, as I expect to be in Boston in the near future, and will advise you when I will go East, soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

I replied at once that I should be pleased to meet him in Boston any day that he might name, and that my address was the Parker house, Boston.

On December 4th, he wrote me as follows:

DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

101 I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker?

My right arm is yet in limbo and writing is a difficult task.

Respectfully yours, JOAB MULVANE.

December 13th I received the following telegram, dated in Boston:

Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE.

I replied that I would meet him in Boston on Saturday at 11.30 a. m. At 11.30 a. m. I was at the Parker house, and waited until 12.45 for Mr. Mulvane to keep his appointment. At that time he came and explained his delay had been occasioned by a meeting of the directors of his railroad, where he was required to make a quorum. Mr. Mulvane, Hanson and myself retired to room 304, on the second floor, where Mr. Mulvane stated that he now owned in his own right $388,000 of the stock of the Topeka Water Supply Com-

pany, leaving but $12,000 of stock to be acquired, which he expected to have in a very few days, so that then he was in position to sell and deliver the entire stock, except $12,000; that he had actually purchased the stock and now owned it, but that it had cost him more money than he expected and that he could not sell the stock at the price he had named in Topeka; that he should require at least $50,000 more than the price then named. After considerable talk and our insisting, that while he had a perfect right to declare this transaction off, yet we understood it to be agreed that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and that, inasmuch as he had carried it out and could accomplish it, we certainly felt that the sum which we had then offered should be accepted by him and the stock delivered to us; that he had been acting as our agent in acquiring the stock, and that it should be delivered to us. After considerable negotiation, he finally said that $25,000 additional or $525,000, was the very lowest sum at which he would sell the property, and would require $50,000 paid on account at time of signing the contract. After further conversation Mr. Hanson and myself retired from the room for a conference with our associates to see if they would pay the $25,000 extra or not. Being unable to find but one of our associates, and he being adverse to paying the additional sum, we retired to the room
102 and told Mr. Mulvane that $500,000 was our best offer and must be accepted today. He absolutely declined to sell at any less sum than $525,000, and declared that all negotiations were off. We put on our coats and hats and started to leave the room but in reply to a question as to how the matter was left, we intimated to Mr. Mulvane that we were left in a peculiar manner with our friends, inasmuch as we had gone to Topeka and made what we supposed to be a trade for the plant, conditionally that the stockholders would sell the stock, but now we found that while the stockholders had agreed to sell the stock and he had bought it in our interest, we were being charged a higher sum and we could not well explain to our associates this advance, and that we really preferred to abandon the whole trade rather than to have any suspicion cast on us by our associates that we had not explained to them the whole story when we returned from Topeka. Mr. Mulvane replied that he realized the position which we occupied and that he was now inclined to accept our proposition, provided we would pay him the sum of $60,000 cash, on signing of the contract instead of $50,000 before asked for; that he could use that sum to advantage and would like to have it. He also stated that he had but $40,000 of the stock in hand, but he felt sure that Mr. Burr, the president of the Bank of North America, in the city of Boston, would be willing to guarantee that the payment of $60,000 on account would be a safe thing for us to do. Accordingly, after considerable negotiation and discussion, the following paper was drawn up and duly signed by all the parties. When Mr. Mulvane had put his signature to the paper he said to us: "There, that is settled now. You have my signature, which you didn't have

when we were in Topeka." The following is a copy of the agreement made in Boston:

BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 1,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand
103 dollars ($100,000) to be paid March 20th, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE.

To Geo. P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON.

It was now half past six, p. m. and I was to take the train for Portland at seven o'clock; I bade them good night with the understanding that Mr. Hanson and Mr. Mulvane would prepare the contract on Monday morning and that I would return to Boston Monday at 1.30 to sign the contract and complete payment, agreeable to the terms of the agreement signed Saturday evening.

Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor, and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay to Mr. Mulvane to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane. In reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party and he had the fullest confidence in his integrity. I then stated to him that I was to pay Mr. Mulvane $60,000 and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended. His reply was prompt and to the point that he would not guarantee the

life of any man, which was in effect what I was asking him to do. Further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself. He didn't believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out. I returned to the Maverick bank at once and stated what Mr. Burr had said, both to Mr. Hanson and to the president of the bank, Mr. Asa Potter. Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself, but stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when we would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make: that Mr. Mulvane had, in the morning, declined to come to the bank to confer with him, and had also declined to have the contract done by a lawyer, that he wanted it to be as simple as possible.

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At 12:30 p. m. Mr. Hanson and myself went to the Parker house and met Mr. Mulvane in the office and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson, to look over and asked him what changes he would suggest. The following is a copy of the contract:

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Me., and Samuel Hanson, of Boston, Mass., party of the second part.

The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th day of February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company, before named; which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of — America.

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The party of the second part also agrees to pay to the party of the first part, interest from the first day of January, 1890,

at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the first day of January, 1890, free from all debts and encumbrances of every kind, except the funded debt, consisting of one hundred and twenty thousand first-mortgage bonds.

He at once objected to our taking possession of the company on January 1st, because he had not then obtained the last $12,000 of stock, and it might be impossible to do so before January 1st. We then suggested making a change, so that the possession of the company should be taken after the delivery of all the stock, agreeable to the terms of the agreement of December 14th. He did not seem satisfied with this arrangement, but did not make further objection to the contract as submitted. In conversation we told him that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and did not think that Mr. Mulvane should ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person, then he, Mulvane, said I understand you will not put up the money unless I put up the stock, and this means more delay. We replied, that inasmuch as Mr. Burr would not guarantee his so doing, we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home and his well-recognized financial ability to make good his promises would be accepted here readily, and that we should make the payment of $60,000 without his putting anything against it except his receipt on account, and he thought the recommendation Mr. Burr had given him was ample and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr.

106 At this point Mr. Hanson said to Mr. Mulvane that he certainly should not ask us to do what he would not do himself, and that we would not expect him to trust us for any part of the payment down, and that in support of our ability and competence to pay, that Mr. Wescott had a letter from the Casco bank as to his standing in Portland, which was equally as high as that which Mr. Mulvane had in his own town. At this point I passed Mr. Mulvane the following letter for him to read, stating to him that before our interview with him on the 14th the cashier of the Casco bank had been asked for a letter to be addressed to him, which he

had given me, but when he asked for a deposit of $60,000 I did not suppose that the letter would be any object for him to think of, or even to read, and I hadn't presented the letter to him, and did not do it now, only to show that my standing was equal to that given him by Mr. Burr. A copy of the letter is as follows:

The Casco National Bank of Portland, Maine.

DECEMBER 13TH, 1889.

Joab Mulvane, Es., Topeka, Kansas.

DEAR SIR: I address you this letter that you may know the reputation for responsibility which Hon. Geo. P. Wescott of this city enjoys should you desire such knowledge.

Mr. Wescott is the surviving partner of the firm of Joseph Wescott and Son, and as a business man has been engaged in some of the largest industrial enterprises in this section, and with uniform success in results. He is considered in this community to be a man of wealth, and is always equal to his agreements. We have known him in this bank as one of its most valued directors for more than eighteen years, and have no hesitation in recommending him to any one with whom he may have business relations, as a man perfectly reliable and responsible to the extent of any engagements he would make. This is our opinion of him and we feel it is the sentiment of all those who know him in this city and State.

Yours respectfully,

(Signed) M. R. GODING, *Cashier.*

Mr. Mulvane, having read the letter, said that the recommendation was certainly good enough to show that we were acting in good faith throughout.

107 Room 63 being very cold, we then went to room 304 and continued our negotiations. Mr. Mulvane had possession of the memorandum which Mr. Hanson had drawn and had it in his pocket; I asked for the copy and undertook to get Mr. Mulvane to agree to such modifications of the contract as would meet his views and make it so that he would sign the same; he absolutely declined to discuss the contract or to suggest any change to be made in any manner whatever. I made some changes in pencil on the memorandum, which will appear in my handwriting. Mr. Mulvane left the room and when he came back about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room; we called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it; we assured him that we had no copy and that it was only a rough draft on which we had asked him to make such changes as would meet his views, but on which he had declined to make any suggestions or enter into any conference whatever in relation to the matter; he, being pressed for the paper, agreed to have a copy made and return the paper at once; at half past six he returned the typewriter's copy to us, saying that he should keep the original and that all negotiations were off,

so far as he was concerned; we then asked him if we could have an interview with him in the morning at the Bank of North America, where we had no doubt that with Mr. Burr present, we could arrange all matters in an amicable and satisfactory manner; he declined to hold any further interviews with us, but said that any communication we had to make, left at the Bank of North America, would be considered by him, but that he didn't want to have any further conversation with us on present negotiations.

GEO. P. WESCOTT.

I, Samuel Hanson, of Boston, Massachusetts, being present at each and all of the interviews pending the making of the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Co., Topeka, Kansas, hereby certify that I have read the foregoing statement made by Geo. P. Wescott, of Portland, Maine, relating thereto, and find the same to be correct, according to the best of my recollection.

I would, however, make the following additions to his statement: My recollection is that when we referred to making payments of $60,000 at National Bank of North America, Mr. Mulvane said that Mr. Burr would give us such assurances that the matter would be perfectly satisfactory to us, and with that statement we left the matter. I also referred him to the Maverick national bank in regard to my own ability to perform the contract, stating that Mr. Potter was one of the parties at interest. Mr. Mulvane also stated that his reason for asking a price in excess of $500,000 was that he had not bought a single share of the stock for which he had not paid more than par. I would also add that on the 17th inst. Mr. Potter wrote Mr. Mulvane at New York expressing surprise at his action and requesting that all papers be laid before Mr. Burr, the president of the Bank of North America, and we abide by his decision, but up to this date no reply has been received.

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SAMUEL HANSON.

Boston, December 21, 1889.

No. 5.

Statement Made by Geo. P. Wescott and Samuel Hanson, Dec'r 17 & 21, 1889.

COMMONWEALTH OF MASSACHUSETTS, } ss.
County of Suffolk, }

On this twenty-eighth day of January, A. D. 1890, before me, Samuel Jennison, a commissioner of the State of Kansas, residing in Boston, duly commissioned and qualified to make affidavits, &c., for said State, personally appeared in said Boston Geo. P. Westcott, of Portland, Maine, and Samuel Hanson, of said Boston, and severally made oath that the statements and all matters and things set forth in their writings hereto attached and signed by them respectively, are true, to the best of their knowledge and belief.

In witness whereof I have hereto set my hand and official seal, at said Boston, this 28th day of January, A. D. 1890.

[SEAL.]

SAMUEL HASSES,
Commissioner for Kansas in Boston.

Indorsed: No. 6118. U. S. circuit court. Samuel Hassen et al. vs. Joab Mulvane et al. Affidavit of Geo. P. Wescott. Filed Feb. 13, 1890. Geo. P. Sheritt, clerk.

In the Circuit Court of the United States, District of Kansas.

George P. Wescott and Samuel Hasses, Complainants,
vs.
Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners Engaged in Business in the City and County of New York, State of New York, as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now, on this 13th day of February, A. D. 1890, this cause coming on to be heard upon the application of said complainants for a temporary injunction herein, as prayed in the bill of complaint herein, and said parties being present by their counsel, to wit, the said complainants by Rossington, Smith & Dallas, and the said Joab Mulvane, the Topeka Water Supply Company and the Topeka Water Company by J. D. McFarland, Hurd & Dunlap and Eugene Hagan, and evidence being presented to the court and the same being argued by counsel, upon consideration whereof, it is, by the court,

Considered, ordered and adjudged that upon said complainants' giving bond in the sum of seventy-five thousand dollars, to be approved by the court, by the 15th day of February, 1890, the said Joab Mulvane, the Topeka Water Supply Company and the Topeka Water Company, and all others acting by, under or through them, or as their agents, emissaries or employés, be enjoined and restrained, pending this suit, or until the further order of this court, from putting upon record any deed or conveyance to the franchises or property in said bill described, to wit, the water works of said city of Topeka, Shawnee county, Kansas, which upon the 14th day of December, 1889, stood in the name of and were owned, controlled and operated by the said The Topeka Water Supply Company, said plant consisting of real estate and appurtenances, such as wells, pumping station, machinery and the like, and water-supply pipes underlying the streets and alleys of the city of Topeka, with all hydrants and attachments of whatsoever nature appurtenant thereto.

It is further considered, ordered and adjudged that said parties be enjoined from signing, sealing or negotiating any such bonds as are described in the circular of Coffin & Stanton in said bill mentioned and described, or in anywise incumbering, conveying or disposing of the title to said water works and franchises, or any part thereof.

110 *That the said Joab Mulvane, as president of said water companies, and said water companies, and said Joab Mulvane individually, be enjoined and restrained from further carrying on said negotiations or delivering said bonds, or executing said bonds or putting said bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any matter in connection with said scheme or enterprize looking to the formation of the Topeka Water Company and its acquirement of said franchises, or from distributing or selling any of said stock of said The Topeka Water Company or the Topeka Water Supply Company, or further ordering or directing said Collin & Stanton to carry on said negotiations; and that all of said parties be enjoined and restrained from offering said stock of the Topeka Water Supply Company or the Topeka Water Company upon the market, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of said The Topeka Water Supply Company, or from in anywise impairing, affecting or terminating the active existence of said The Topeka Water Supply Company as the owner and operator of the franchises aforesaid, or from delivering or assigning any of the stock of the Topeka Water Company to any person or persons whomsoever.*

It is further ordered that a copy of this order be entered upon the journal of this court.

C. G. FOSTER, *Judge.*

Indorsed: No. 6148. Order. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

Copy of Order.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants. } No. 6148.

Now, on this 15th day of February, 1890, it is ordered by the court in the above-entitled cause, that in lieu of a bond for seventy-five thousand dollars, the said complainants herein may deposit with the clerk of this court the sum of seventy-five thousand dollars in cash, and that said deposit shall stand for a bond for all damages from commencement of this suit until the further order of the court whereby said complainants will be obligated and bound to pay to the defendants all costs and damages aforesaid, if it shall be finally held that said injunction or restraining order was improvidently granted.

C. G. FOSTER, *Judge.*

111 Indorsed: No. 6148. Order. Filed Feb. 15, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

George P. Wescott et al., Complainants,
vs.
Joab Mulvane et al., Defendants. } #6118.

We enter ourselves sureties for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjusted to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated 17th day of February, 1890.

ROBINSON, SMITH & DALLAS.

#6118. Cost bond. Filed Feb. 17, 1890. Geo. P. Sharitt, clerk.

In the Circuit Court of the United States for the Dist. of Kansas.

GEO. P. WESCOTT & SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Comes now Wm. H. Moulton, Theo. C. Woodbury and Edward York, partners, doing business under the firm name of Woodbury and Moulton, and files this their application to be made parties defendant in the above-entitled cause for the following reasons:

1st. That they are necessary and indispensable parties defendant in said cause to a full determination of the questions involved in said cause, and are interested in the subject-matter of the suit.

2nd. That prior to the commencement of said suit they, with Cobb & Stanton named as defendants in said suit, had, in good faith, for a valuable consideration, and without notice of any claims of said complainants, purchased from Joab Mulvane, defendant above named, and became the absolute owners of all the capital stock of The Topeka Water Supply Company, defendant above named.

All of which will fully appear from affidavits and other evidence on file, and to be presented upon the hearing of this motion.

J. D. McFARLAND,
EUGENE HAGAN,
HURD & DUNLAP,
Attorneys for Woodbury & Moulton.

Indorsed: No. 6118. Geo. P. Wescott *et al.* vs. Joab Mulvane *et al.* Application of Wm. H. Moulton, Theo. C. Woodbury, & Edward York to be made parties defendant. Filed Feb. 24, 1890. Geo. P. Sharitt, clerk.

STATE OF NEW YORK, } ss:
City & County of New York, }

Theodore C. Woodbury and Walter Stanton, being severally sworn, each for himself, says: The said Theodore C. Woodbury, that he is one of the firm of Woodbury & Moulton, of Portland, Maine; and the said Walter Stanton, that he is one of the firm of Coffin & Stanton, of New York city. And we do further say that in December, 1889, at New York city, we, as representatives — said firms, purchased of Joab Mulvane, of Topeka, Kansas, all the capital stock of the Topeka Water Supply Company, and on the same day paid him $50,000 in cash on account thereof, agreeing to pay the balance upon February 10th, 1890.

It was further provided, that on Jan. 1, 1890, the works should become the property of the purchasers. This purchase was made by us in good faith without any notice of any claim or contract on the part of any one else. And as the owners of the property we have since the said purchase controlled the same.

Inasmuch as the capital stock of the old company was not sufficient to allow of a mortgage for future extensions to the amount deemed by us advisable, we instructed our counsel, Mr. John B. Gleason, of No. 115 Broadway, New York city, to have the proper steps taken to that end, and by his direction a new company was incorporated, known as the Topeka Water Company. An ordinance was obtained from the city of Topeka, authorizing a transfer, and on January 31, 1890, a transfer was made from the old to the new company, and on Feb. 1, 1890, a mortgage of $1,500,000 was executed or delivered to the Atlantic Trust Company of New York, trustee, and was, after being signed by said trust company, sent back to Topeka to the register of deeds to be recorded; all of which acts and many others have been done by us or our direction as owners of the said property, and at considerable cost and expense, relying upon said purchase.

113 The balance of said purchase price was to be paid in New York city, upon February 10, 1890, and the said Woodbury is here from Portland for that purpose, and we are prepared and ready to pay the balance of the purchase price today.

The Atlantic Trust Company of New York was selected by us as trustee, and is ready to certify the bonds. We are advised by telegram that an action has been commenced in Topeka to compel Joab Mulvane to convey the property to other parties. No papers have been served upon us, but as the owners of the property, and being under contract to deliver large quantities of the bonds of the new company to third parties as purchasers, we insist that the temporary injunction said to have been granted, should be vacated.

Subscribed and sworn to before me February 10, 1890.

THEODORE C. WOODBURY.
WALTER STANTON.

In witness whereof, I have hereunto set my hand and [SEAL] affixed my official seal this 10th day of February, A. D. 1890.

CHARLES NETTLETON,
Commissioner for Kansas in New York,
115 & 117 *Broadway, N. Y. City.*

Indorsed: No. 6448. Affidavit of Woodbury & Stanton. Filed Feb. 24, 189–. Geo. F. Sharitt, clerk.

STATE OF MAINE, *Cumberland County,* } ss:

I, Theodore C. Woodbury of Portland, in said county, certify on oath, that I am a citizen of the United States and of the State of Maine, resident at said Portland, and a member of the firm of Woodbury & Moulton, of said Portland, composed of myself and William H. Moulton and Edward H. York; that in December, 1889, representing my said firm, I, with Walter Stanton of the firm of Coffin & Stanton in New York city, and representing his said firm, purchased of Joab Mulvane of Topeka, Kansas, the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, paying therefor at the time of said purchase fifty thousand dollars of the purchase price and agreeing to pay the balance thereof with interest from and after January 1, 1890, on the tenth day of February, A. D. 1890, which my said firm of Woodbury & Moulton and the said Coffin & Stanton were ready to pay on that day and date, and are still ready to pay the same; that by the terms of said purchase the said two firms, purchasers as aforesaid of said stock, were and are entitled to 111 all the revenue of said company from and after the first day of January, A. D. 1890; that at the time of said purchase I had no acknowledge of any prior sale of said stock by said Mulvane to any other party, person, firm or corporation, or of any claim that any other party has bought said stock or the works of said company; and that said purchase was made by my said firm jointly with said Coffin & Stanton, in good faith.

I, the said William H. Moulton, certify on oath that I am a citizen of the United States and of the State of Maine, resident of said Portland, and a member of the firm of said Woodbury & Moulton; that said Woodbury acted for our said firm in making said purchase jointly with said Coffin & Stanton, and all his doings in that behalf have been and are fully approved by the other members of our said firm, part purchasers as aforesaid; and at the time of said purchase I had no knowledge of any sale of said stock or said company's works having been previously made by said Mulvane to any other party, or parties, or that any person or party claimed to have purchased the same.

I, the said Edward H. York, certify on oath that I am a citizen of the United States and of the State of Maine, resident of said Portland, and a member of the said firm of Woodbury & Moulton; that said Woodbury acted for our said firm in making said purchase

jointly with said Coffin & Stanton, and all his doings in that behalf have been and are fully approved by the other members of our said firm, part purchasers as aforesaid; and at the time of said purchase I had no knowledge of any sale of said stock or said company's works having been previously made by said Mulvane to any other party, or parties or that any person or party claimed to have purchased the same.

THEODORE C. WOODBURY.
WILLIAM H. MOULTON.
EDWARD H. YORK.

UNITED STATES OF AMERICA:

STATE OF MAINE, }
Cumberland, } *ss.*:

FEBRUARY 20, A. D. 1890.

Then personally appeared the above-named Theodore C. Woodbury, William H. Moulton and Edward H. York, all to me well known and known to be the persons they represent themselves to be, and severally made oath to the truth of the foregoing affidavit by them subscribed in my presence.

Before me

[SEAL.] BYRON D. VERRILL,
Notary Public within and for said County and State.

115 STATE OF MAINE, }
Cumberland, } *ss.*:

CLERK'S OFFICE, SUPERIOR COURT,
PORTLAND, *Feb'y 20th*, 1890.

I, B. C. Stone, clerk of all the judicial courts, within and for said county of Cumberland (being courts of record), do hereby certify, that Byron D. Verrill is, and at the date of his certificate to the paper hereto annexed, was an acting notary public, within and for the county of Cumberland, in said State; that he is duly commissioned and qualified to administer oaths, and take acknowledgements of deeds and other instruments in writing, and that the foregoing signature, purporting to be his, is genuine, to the best of my knowledge and belief.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of the said superior court, for said county the day and year first above written.

B. C. STONE, *Clerk.*

Indorsed: No. 6448. Affidavit of Woodbury, Moulton & York. Filed Feb. 24, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas. In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, Joab Mulvane, by its solicitors, and enters its appearance herein in this suit and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, Joab Mulvane, herein. Dated this 3d day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, Joab Mulvane.

Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of Joab Mulvane, def't. Filed March 3, 1890. Geo. F. Sharitt, clerk.

116 In the Circuit Court of the United States for the District of Kansas. In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, The Topeka W——, by its solicitors, and enters its appearance herein in this suit, and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, The Topeka Water Company, herein. Dated this 3rd day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant.

Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of The Topeka Water Company, def't. Filed March 3, 1890. Geo F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, The Topeka Water Supply Company, by its solicitors, and enters its appearance herein in this suit and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, The Topeka Water Supply Company, herein. Dated this 3d day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, The Topeka Water Supply Company.

117 Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of The Topeka Water Supply Company, def't. Filed March 3, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Walter Stanton, of New York city, being duly sworn, says: I am one of the firm of Coffin & Stanton, bankers, doing business at No. 72 Broadway, New York city. This firm consists of four members, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, all of whom were members of the firm at the times mentioned in this affidavit. All of said persons are citizens of the State of New York and reside in the city of New York.

In December, 1889, Mr. Coffin was absent in Indianapolis, and Mr. Jackson was absent in Europe, and Mr. Street was absent in California: I had authority from my said firm to enter transactions of a character like the transaction with Mr. Joab Mulvane, hereinafter mentioned, and conducted the negotiation with Mr. Mulvane in behalf of said firm, but none of the other members of said firm had any personal knowledge of the transactions at the time when they were

made, and neither I, nor any of said persons, had any knowledge or information or notice that there was any obstacle in the way of our purchasing of Joab Mulvane the capital stock and property of the Topeka Water Supply Company, nor that any contract had been made by him with any one else in regard thereto, and, in particular, we had no knowledge or information that the plaintiffs in this action had or claimed any rights whatever with reference to said capital stock or property, or that they had any contract whatever with Joab Mulvane in regard thereto, and, upon my information and belief, derived from the statements of Theodore C. Woodbury, of Portland, Maine, to me, I allege that neither the said Theodore C. Woodbury, nor any one of the firm of Woodbury & Moulton, of Portland, Maine, had any knowledge or information upon the said subject.

In December, 1889, the firm of Coffin & Stanton, represented by me, and the firm of Woodbury & Moulton, of Portland, Maine,
118 represented by Mr. Theodore C. Woodbury, had agreed with one another that we would purchase the Topeka Water Supply property, if we could do so, and had entered into negotiations with Joab Mulvane with regard thereto. As the result of our negotiations a meeting was had by myself and Mr. Woodbury with Mr. Mulvane, in the city of New York in December, 1889, and, at this meeting, in behalf of our said firms, we purchased of Mr. Mulvane all the capital stock of the Topeka Water Supply Company for the sum of $550,000, and paid to him $50,000, in cash upon the account of such purchase and as portion of the purchase price. The payment of the remaining $500,000 of the purchase price was extended to February 10th, 1890, but, as the owners of the property, we have since the said purchase controlled the same and have in good faith regarded ourselves as the owners of the property, and we made the said purchase and did all the acts hereinafter detailed without any notice of any claim or contract on the part of any one else affecting the said property or any portion thereof, and having no reason whatever to believe or suppose that the plaintiffs in this action had or claimed any interest therein or any cause of action of the nature claimed by them. Regarding the property as our own we have materially changed its condition and have incurred large obligations on account thereof. The capital stock of the old company was not sufficient to allow of a mortgage for future extensions to the amount deemed by us advisable. We accordingly instructed our counsel, Mr. John B. Gleason, of 115 Broadway, to have the proper steps taken so that a mortgage of $1,500,000 could be placed upon the said property, of which amount the sum of $870,000 should be placed in trust, $120,000 to provide for the bonds of the old company, and $750,000 to provide for proper extensions. Under his direction a new company was incorporated in our interest known as the Topeka Water Company with a capital stock of $1,500,000. Application was made to the council of the city of Topeka for leave to transfer the property of the old company to the new company and to continue the contract with the old company in the name of the new company, and, in January, 1890, an ordinance was duly made by the city of Topeka authorizing such transfer upon certain conditions, which were accepted by the new company in our

behalf, and thereupon, and on January 31st, 1890, a conveyance of all the property of the old company was made to the new company, and the new company assumed the duty and obligation of supplying the city of Topeka with water and of carrying out all the formal contracts of the old company. And, in pursuance of proper resolutions, and upon February 1st, 1890, a mortgage of $1,500,000 was executed by the new company and was delivered to the Atlantic Trust Company of New York, as trustee, being the trustee selected by us,
119 and the trustee accepted the said trust and executed the said mortgage and forwarded the same to the register of deeds at Topeka, to be recorded. We also procured the bonds of the new company to be lithographed, and sent the same to the officers of the company, at Topeka, to be signed and executed, in denominations of $1,000 and $500, and, in good faith, believing that we were the owners of the said property and entitled to the said bonds, we recommended the same to different ones of our customers, exhibiting to them copies of the bond and mortgage and of the various papers in connection therewith, as well as the opinion of our counsel upon the validity of the bonds, and, thereupon, sold $220,000 of the said bonds, and the said Woodbury & Moulton sold $100,000 thereof, for immediate delivery after February 10th, 1890, and we procured the residue of the purchase price of said property, $500,000, and now have the same on hand for the purpose of paying the balance of the purchase price. All of the aforesaid steps were taken by us before we had any notice of the plaintiff's claim. We are subjected to great inconvenience and damage by reason of the delay occasioned by the injunction in this action. We insist and demand that the stock purchased by us shall be forthwith delivered to us and that the said bonds shall be delivered to the Atlantic Trust Company, and that we shall be secured in the benefit of our purchase and protected from the claims of the parties to whom we have, in good faith, sold the bonds as aforesaid. We are not willing to surrender any of our rights as the owners of the said property, or under the transfer to us from Joab Mulvane; and we ask that, as innocent purchasers of the said property, we shall be protected in the ownership thereof and shall be allowed forthwith to fulfil the engagements which we have made with reference to the delivery of the bonds.

In addition to our legal rights as owners of the said property, we respectfully insist that our equities in this matter are so much greater than any that the plaintiffs can have, that a court of equity will leave the plaintiffs to their action for damages against Joab Mulvane, if he has made a contract with them for the sale of said property. These equities consist in part of the payments that we have made and the large obligations which we have incurred, as above stated; but still more in the fact that we have in good faith materially changed the condition of the property and have greatly enhanced its value in a commercial point of view, so that, if the plaintiffs obtain the property, they will receive something materially different from what was contemplated by them when their contract was made. In other words, a specific performance cannot be decreed in any event, as it

seems to us, because the identity of the subject-matter has
120 been changed by our act into something much more valuable and to the benefit of which we are entitled. The Topeka Water Supply Company is a corporation of the State of Kansas, originally incorporated with a capital stock of $200,000, subsequently increased to $400,000. The laws of Kansas allow of an increase in the capital stock of a corporation to three times its original amount upon the filing of a certificate, so that the capital stock of the Topeka Water Supply Company could be increased in this way only to $800,000, and, when so increased, could only be mortgaged to the amount of the capital stock. There is already a mortgage of $120,000 upon the property of said company and the stockholders of said company are personally liable for its debts. In our judgment, derived from long experience, it would be impracticable to sell to investors the capital stock of said company at a price which would repay the original outlay to be incurred by the plaintiffs or by us on account of this personal liability of the stockholders, and, unless a mortgage can be issued in an amount sufficient to provide fully for future extensions and improvements the value of a water property is much impaired. In order, therefore, to provide for such a mortgage, as well as for an opportunity to reimburse the purchasers for their purchase, it was necessary to create a new corporation, and this was done by us; but, under the laws of the State of Kansas, it was necessary for the new corporation to have an ordinance from the city of Topeka in order to do business and to succeed to the rights of the former company under its contract with the city of Topeka. By the obtaining of this ordinance we succeeded in making legal a necessary part of the development of the said water works, and which we are advised by our counsel could have in no other way been effected.

If the plaintiffs are successful in this action, instead of acquiring a property with a capital stock of only $400,000, and under the disabilities above mentioned, they will acquire a property with an authorized capital stock of $1,500,000, having a new contract with the city of Topeka and mortgage bonds to the amount of $1,500,000, carefully secured, as will better appear by reference to a copy of the mortgage. The difference in the commercial value of these two properties is very great, and of this enhanced value we ought not to be deprived.

WALTER STANTON.

121 Sworn to before me this 25th day of February, 1890.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Notary Public for New York, State of New York,
117 *Broadway, N. Y. City.*

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON;
Commissioner for Kansas in New York.
115 & 117 *Broadway, N. Y. City.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF NEW YORK, }
City and County of New York, } ss:

William Edward Coffin, of New York city, being duly sworn, says: I am one of the firm of Coffin & Stanton, and am the only member of the firm now in New York city except Mr. Walter Stanton; none of the other members of the firm has had any knowledge with reference to the particular matters set forth in the annexed affidavit of Mr. Stanton, to which I refer, but the said Stanton has had full authority from the said firm to transact all the business in the said affidavit referred to. I was absent from New York city when the purchase referred to in the said affidavit was made; I had no knowledge or information as to any claim on the part of the plaintiffs with reference to said property until about the 10th day of February, 1890, when I was informed by telegram from Topeka of the bringing of the present action; all the transactions of our firm in the purchase of said property and as detailed in the affidavit of Mr. Stanton have been made in the belief that we, with the firm of Woodbury & Moulton, were the owners of said property, and in good faith and without any notice or knowledge of the plaintiffs' claim; and I concur in all the allegations of Mr. Stanton's affidavit as to the inconvenience and loss to which we are subjected by the injunction in the present action.

122 There is no partnership relation subsisting between our firm and the firm of Woodbury & Moulton, but each firm is the owner of an undivided interest in the said property and has incurred separate obligations upon account thereof.

WM. EDWARD COFFIN.

Sworn to before me this 25th day of February, 1890.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Notary Public for New York, State of New York.
117 *Broadway, N. Y. City.*

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Commissioner for Kansas in New York,
115 & 117 *Broadway, N. Y. City.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF MAINE,
County of Cumberland, City of Portland, } ss.:

Theodore C. Woodbury, of Portland, Maine, being duly sworn, says: I am one of the firm of Woodbury & Moulton, which consists of the following members, to wit: Theodore C. Woodbury, William H. Moulton and Edward H. York, all of whom are citizens of the State of Maine and of the United States of America, residing at Portland, Maine. I refer to the annexed affidavit
B. D. V.
N. P. of Walter Stanton for a statement of the circumstances of the purchase of the Topeka Water Supply Company from Joab Mulvane, and I fully concur in the statements of the said affidavit and adopt them as my own, except so far as they are necessarily personal to Mr. Stanton. I had authority from my firm to enter into transactions of this character, but none of the other members of said firm had any personal knowledge of the transactions at the time when the purchase was made, as the same was effected in New York city, and they were in the State of Maine. I had
123 no knowledge or information whatever that the plaintiffs had or claimed any contract or rights with reference to the Topeka Water Supply Company, and joined in the said purchase in the belief that we might legally and properly make the same, and in good faith and under circumstances similar to those stated by Mr. Stanton with reference to himself and his said firm, and all the subsequent transactions were had by me and by my said firm, relying upon the belief that we were the actual purchasers and owners of the said property and without any knowledge or notice of the plaintiffs' claim in the matter.

I refer to the affidavit of Mr. Stanton for a statement of what was done by us with reference to the property, and adopt and fully concur in all his statements with reference to the same and to the value and importance thereof, and to the injury and injustice which is done to us by the injunction which has been granted in this action.

THEODORE C. WOODBURY.

Sworn to before me this 26th day of February, 1890.
In witness whereof, I have hereunto set my hand and affixed my

official seal this 28th day of February, A. D. 1890, at said
[SEAL.] Portland. I know said Woodbury and that he is the person he represents himself to be.

BYRON D. VERRILL,
Notary Public within and for the County of Cumberland and State of Maine.

STATE OF MAINE, *Cumberland,* } ss:

CLERK'S OFFICE, SUPERIOR COURT.
PORTLAND, *February 26th*, 1890.

I, B. C. Stone, clerk of all the judicial courts within and for said county of Cumberland (being courts of record), do hereby certify that Byron D. Verrill, Esq., is, and at the date of his certificate to the paper hereto annexed, was an acting notary public within and for the county of Cumberland, in said State; that he is duly commissioned and qualified to administer oaths, and take acknowledgements of deeds and other instruments in writing, that I am well acquainted with the handwriting of said notary and verily believe that the foregoing signature purporting to be his is genuine.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of the said superior court for said county, the day and year first above written.

B. C. STONE, *Clerk.*

124 Indorsed: No. 6448. Affidavit of Stanton, Coffin & Woodbury. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk.

Answer of Joab Mulvane, One of the Defendants, to the Bill of Complaint of George P. Wescott and Samuel P. Hanson, Complainants.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

This defendant now, and at all times hereafter, saving and reserving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much or such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, he answers and says:

He admits that prior to the 12th day of November, 1889, The Topeka Water Supply Company, defendant herein, was a corporation organized and existing under and — virtue of the laws of the State of Kansas; that this defendant was the president of said company, that the capital stock of said company was divided into four thousand shares of one hundred dollars each, and that said defendant at that time owned a large number of shares of its capital stock; but the defendant avers that he did not own a majority of the shares thereof; further, this defendant admits that the city of Topeka, by virtue of an ordinance theretofore passed, had granted to said, The Topeka Water Supply Company, the right and privilege of supply-

ing the city of Topeka and the citizens of said city, with water for a period of time in said ordinance named, and the right to extend its pipes throughout any and all of its streets, avenues, alleys and public grounds of said city for the purpose of distributing water, and that prior to said time it had constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also possessed and owned an engine-house, grounds, appliances and wells, and was engaged in distributing and supplying water by means of its said appliances, throughout said city, and that its said plant and property was valuable and its operations profitable.

This defendant further says that some time during the month of October, or early part of November, 1889, the said complainants came to this defendant at the city of Topeka with propositions for the purchase of either the majority or all of the stock of said The Topeka Water Supply Company, but this defendant avers that he did not at that time, nor at any time prior to the 14th day of
125 December, 1889, make said complainants any propositions to sell to them all or any portion of the capital stock of said The Topeka Water Supply Company, and this defendant avers that he did not at that time or afterwards or at any time enter into a contract with said complainants whereby he sold or agreed to sell to said complainants any or all of the stock of said company, but on the contrary this defendant avers that at said time, at said city of Topeka, he refused to entertain any of the propositions made by said complainants for the purchase of all or a part of the stock of said company, and declined at that time to make or enter into a contract with respect to the same.

This defendant further says that he admits that he afterward wrote the letters mentioned in said bill of complaint, and that pursuant to the arrangements thereby made, he met said complainants in the city of Boston, on or about the 14th day of December, 1889, and then entered into negotiations with said complainants respecting the sale of the entire capital stock of the said The Topeka Water Supply Company.

Defendant further says that during said negotiations he told said complainants that he was not the owner of all the said stock of said corporation, and did not know how long it would take him to get all of said stock; that he had only with him there about 390 shares of said stock; that he was willing to enter into a contract with them for the sale of all of said stock, provided a sufficiently large sum was paid down in cash to insure him of their good faith and ability as proposed purchasers and that they would carry out their contract and he could have sufficient time to obtain control of the balance of the stock of said company which he did not then have. That after considerable talk, and late in the afternoon of the said 14th day of December, 1889, this defendant made said complainants a proposition to sell to them all of the capital stock of said company, which proposition one of the complainants, at his own instance, wrote down, in substance, as is set out in said complainants' bill, and asked this defendant to sign it, which he did, and thereupon one of said com-

plainants wrote an acceptance of the same, and said defendants signed said acceptance in substance as set forth in said bill of complaint. But this defendant avers that at the time he made the said proposition it was understood and agreed that said complainants and this defendant should meet on the following Monday and agree upon and execute a contract for the sale of said stock, which said contract was to embody all the necessary details not then agreed upon, which said contract the said Hanson agreed to block out, and meet
126 this defendant on the following Monday, at which time they were to agree upon a contract for the sale of said property, if they could so agree, and enter into a valid and binding contract with respect to the same.

This defendant further says that said proposition and acceptance was only of the nature of preliminary negotiation, and was not to be, and was not intended to be or become of binding effect unless a definite and complete contract embodying all the necessary details and terms of said sale should be agreed upon and entered into between said parties upon said Monday.

Defendant further says that at the time said negotiations of December 14th were had, it was not contemplated that this defendant should immediately deliver or place in the bank said shares of stock; such immediate delivery being and being known to said complainants to be an impossibility; that prior to the making or signing of said proposition this defendant had told said complainants that they must rely upon his personal responsibility to carry out a contract upon his part, if one was made, and there was no agreement or understanding as to when said shares of stock should be placed in the bank, but it was understood that it was impossible for this defendant to place all of said shares there at once, and not for some time thereafter.

This defendant further says that on the Monday following said 14th day of December, 1889, he again met said complainants, who then presented him for his signature a form of contract, a copy of which is hereto attached, marked Exhibit "A;" that said defendant declined to sign said contract for the reason that it was at variance with his proposition, and because it required him to at once place said shares of stock in the bank, which he could not do, and which it was the agreement and understanding upon the previous Saturday that he was not to be required to do; that said complainants refused to accept or enter into any contract except a contract which would require this defendant to immediately place said shares of stock in said bank; that said complainants did not at said time, or afterwards or at any time tender or offer to pay this defendant the sixty thousand dollars mentioned in said proposition, or any part thereof; that after said complainants had refused to enter into a contract, except a contract requiring this defendant to immediately place said shares of stock in the bank, this defendant notified said complainants that he withdrew all of his propositions for the sale of said stock that he had heretofore made, and declined to negotiate further upon the basis of said propositions.

127 This defendant further says that neither of said complainants, nor no one of them have since said time or at any time, offered to make any contract with this defendant for the purchase of said shares of stock, or tendered this defendant any money as part payment therefor, unless said contract was tendered by Mr. C. R. Smith, one of the complainants' solicitors, which said tender, if any was made to this defendant, was made by Mr. Smith offering this defendant a paper about the time of the serving of the restraining order in this suit, which paper said Mr. Smith asked this defendant to sign, but this defendant does not know the contents of said paper and refused to examine or sign the same.

This defendant further avers that at all times during the pendency of said negotiations and up until the time he notified said complainants that he withdrew his propositions for the sale of said stock, he was ready and willing to sell said stock to said complainants at the price and upon the terms of payment provided in said proposition, and was ready and willing and would have carried out and complied with the spirit and intention of the negotiations of said 14th day of December, had said complainants also been willing to do the same, and this defendant was ready and willing prior to the time that he notified said complainants that he withdrew his propositions, to enter into a valid contract in writing with said complainants for the sale of said stock, in accordance with the understanding of the parties had on said 14th day of December.

This defendant further says that at the time said negotiations were had with said complainants in the city of Boston, he did not own and control all of the capital stock of said Topeka Water Supply Company, which fact was well known to said complainants, and this defendant then had with him only 390 shares of said stock; that when said negotiations were being had on said 14th day of December, it was the understanding that this defendant was not to be required to deliver any of said stock unto said complainants until they had placed in the bank money sufficient to pay for all of said stock; that it was the understanding that said complainants should pay to this defendant sixty thousand dollars when the contract should be entered into, and that they should rely upon the personal responsibility of this defendant for the performance of the contract upon his part; that said complainants on the Monday following refused to enter into a contract except a contract requiring this defendant to at once place in said bank all of the stock of said Topeka Water Supply Company; that this defendant avers that said negotiations did not and never did result in any definite contract respecting the

128 sale of said stock; that no completed contract, valid and binding upon either of said parties, was made or entered into between this defendant and said complainants respecting the sale of said stock; that said complainants on the 16th day of December, 1889, refused to enter into a contract such as had been contemplated by the parties during their negotiations on said December 14th, and refused to enter into any contract except one at variance with the understanding of said parties on said last day named.

This defendant further says that afterwards and after he had de-

clared the negotiations with said complainants off, and notified them that he withdrew his propositions and would not negotiate further with them, and on the 18th day of December, 1889, at the city of New York, in the State of New York, he sold to Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners under the firm name of Coffin & Stanton, defendants herein, and to William H. Moulten, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton, jointly all of the capital stock of said The Topeka Water Supply Company; that as this defendant is informed and believes and charges the fact to be, the aforesaid two firms were not and are not partners in the purchase and ownership of said stock, but were and are joint purchasers and owners thereof; that each of said firms purchased an undivided interest in said stock; the said firm of Coffin & Stanton purchasing and owning an undivided interest therein, and said firm of Woodbury & Moulton purchasing and owning the other and remaining undivided interest therein.

And this defendant is informed and believes and charges the fact to be that neither of the aforesaid purchasers of said stock at any time prior to the purchase thereof, as aforesaid, had any notice or knowledge of the pretended claims of said complainants as set up in their bill of complaint, but on the contrary, said purchasers purchased said stock in good faith and for a valuable consideration, and did on the 18th day of December, 1889, pay to this defendant fifty thousand dollars as part of the purchase-money of said stock, and entered into an agreement to pay this defendant the further sum of five hundred thousand dollars on the 10th day of February, 1890, at which time said stock was to be delivered to said firm of Coffin & Stanton and said firm of Woodbury & Moulton, as joint owners of the same; that by said purchase on said 18th day of December, said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of said Topeka Water Supply Company, and entitled to the possession thereof on the
129 payment of the balance of the purchase-money as then agreed, and this defendant is informed and believes and so charges the fact to be, that on the said 10th day of February, that Coffin & Stanton and said Woodbury & Moulton, were ready to pay said balance of said purchase-money, in accordance with said contract, and would have done so, and this defendant would have delivered to them the certificates of said shares of stock, had it not been for the issuing of the temporary restraining order and injunction issued herein. Defendant further says that according to the terms of the sale of said stock, the said Coffin & Stanton and said Woodbury & Moulton, were on and after the first of January, 1890, entitled to the incomes and profits of said water works, and that since said first day of January, 1890, said water works have been managed, operated and controlled in the interest of and for the benefit of said Coffin & Stanton and said Woodbury & Moulton, and all the incomes and profits accounted for to them.

This defendant further says that said Woodbury & Moulton and said Coffin & Stanton, deemed it desirable that the franchises and

property of said Topeka Water Supply Company should be transferred to and placed in the possession of a corporation with a greater capital stock than provided for by the charter of the Topeka Water Supply Company, and accordingly this defendant, at the suggestion of said Coffin & Stanton and said Woodbury & Moulton, and for their benefit procured the Topeka Water Company to be organized, and thereafter the city council of the city of Topeka passed an ordinance authorizing the conveyance to said The Topeka Water Company of the privileges and franchises granted to the Topeka Water Supply Company by ordinance of said city of Topeka, and in accordance with the terms thereof a conveyance was duly made and duly executed by said Topeka Water Supppply Company of its property and franchises unto said The Topeka Water Company, and which was duly delivered, and a copy thereof together with the acceptance of said ordinance filed in the clerk's office of the city as required by the terms of said ordinance; all of which was done prior to the commencement of this suit; and this defendant says that he has no interest in the Topeka Water Company, but assisted in the organization thereof and in procuring the passage of said ordinance for the benefit and at the request of said Coffin & Stanton and said Woodbury & Moulton, the purchasers of said stock as hereinbefore stated.

This defendant further says that after the organization of said The Topeka Water Company, said company executed its first mortgage to secure the payment of its first-mortgage bonds to the
130 amount of one million five hundred thousand dollars upon all the property and franchises so as aforesaid conveyed to it, which said mortgage was delivered to the Atlantic Trust Company, a corporation duly organized and existing in the State of New York, and a citizen of the State of New York, as trustee; that said The Topeka Water Company also executed five hundred thousand dollars of the said first-mortgage bonds and was ready to deliver the same to said Atlantic Trust Company as such trustee, which trustee was ready to certify and deliver to the parties who had agreed to purchase the same; and the same would have been so delivered had not such delivery been prevented by the temporary restraining order and injunction issued in this suit.

This defendant further says that he is informed, and believes and charges the fact to be that the said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, and each of them, are citizens and residents of the State of New York, and that said William H. Moulton, Theo. C. Woodbury and Edward H. York are each residents of the city of Portland, in the State of Maine, and are each citizens of said State of Maine, and were such citizens at and before the institution of this suit, and that parties last herein named are necessary and indispensable parties to this suit.

Further answering, this defendant says that he declined to go on with said negotiations had with said complainants in the city of Boston, and withdrew his propositions made to them and declared the transactions off, because he believed said complainants were not acting in good faith and were attempting to induce him to make a

contract that would bind him, but would not bind them, and because he believed said complainants did not intend to pay him the sixty thousand dollars to be paid upon the consummation of the contract; and this defendant says he is informed and believes and charges the fact to be that said complainant, Samuel Hanson, has no property or means of any considerable amount, and that said complainant, George P. Wescott, is not possessed of means or property sufficient to make him pecuniary responsible to anywhere near the sum at which this defendant had proposed to sell said stock; that said complainants did not at any time during said negotiations disclose to this defendant who their associates were, if they had any, in said transaction.

This defendant, in addition to the foregoing answer, submits to the court whether or not said complainant is, by reason of the matters and things in said bill contained, entitled to any relief as against this defendant, and he claims the same benefit by reason thereof and in like manner, as if he had demurred to said bill for want of equity. Further, this defendantt says that said Edward
131 Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners as Coffin & Stanton, and said Atlantic Trust Company, although made parties to the bill, have not been served with subpœnas, and that said William H. Moulton, Theo. C. Woodbury and Edward H. York, partners as Woodbury & Moulton, are not made parties to complainants' bill, and this defendant submits whether or not said parties or some of them are not necessary and indispensable parties defendant to said bill, and claims the same benefit and advantage by reason of any defect in said bill for want of parties in like manner as if he had pleaded the same. And this defendant denies all and all manner of unlawful combinations and fraud charged against him in said bill; and, further answering, this defendant denies all and every the matter and things in said bill contained, material and necessary for this defendant to answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

JOAB MULVANE, *Defendant.*
WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, Joab Mulvane.

UNITED STATES OF AMERICA,)
State and District of Kansas, County of Shawnee,) ss:

On this first day of March, 1890, before me the undersigned, personally appeared the above-named Joab Mulvane, and made oath that he has read the foregoing answer subscribed by him and knows

the contents thereof, and that the facts therein stated, so far as they are stated of his own knowledge, are true, and so far as they are stated on information and belief he believes them to be true.

Witness my hand and official seal the day and year last above written.

[SEAL.]

ELIAS SHULL,
Notary Public, Shawnee Co., Kas.

Term ends March 17, 1892.

EXHIBIT A.

The Brunswick—Barnes & Dunklee, Boston.

132 Agreement made & entered into this 14" day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Mass., party of the second part.

The said party of the first part hereby sells and agrees to have properly assigned, transferred & delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars. The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement; two hundred thousand dollars on the 10th February, 1890; one hundred & forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th day of February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th day of March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th Feb'y. The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass. the certificates representing the entire capital stock of the Topeka Water Supply Company, before named, which certificates shall be indorsed
transferred in blank. It being the intention of this agreement that the said stock shall be delivered & paid for at the said National Bank of North America. The party of the second part also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum on the sums amounting to four hundred & forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees [(that the party of the second part shall receive all monies or income from any source to which the Topeka Water Supply Company may be entitled
and
from the first day of January, 1890,)]* that said corporation shall

[* Words and figures enclosed in brackets erased in copy.]

after full pay-
be turned over to said party of the second part (on the first day ment for said stock
of Jan'y, 1890), free from all debts & encumbrances of every kind, except the funded debt, consisting of one hundred & twenty thousand first-mortgage bonds.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiff-, *vs.* Joab Mulvane *et al.*, defendant-.
133 Answer of Joab Mulvane. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, E. Hagan, Hurd & Dunlap, J. D. McFarland, sol's for def't-, Topeka, Kansas.

Plea of The Topeka Water Company to the Bill of Complaint of George P. Wescott and Samuel Hanson, Complainants.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Faucett Street, Engaged in Business under the Firm Name of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

This defendant, by protestation, not confessing or acknowledging any of the matter- and things in and by said bill set forth and alleged to be true in manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill, says that heretofore, to wit, on the 18th day of December, 1889, and before the commencement of this suit, William H. Moulton, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton, together with the above-named defendants, Coffin & Stanton, partners as above stated, jointly purchased all of the capital stock of said The Topeka Water Supply Company, mentioned in said bill, from the above-named defendant, Joab Mulvane, and did, upon the 18th day of December, 1889, pay to said Joab Mulvane, as part of the purchase-money thereof, the sum of fifty thousand dollars, and that in pursuance of the terms and conditions of said sale, the said firms of Coffin & Stanton and Woodbury & Moulton were to pay to the said Joab Mulvane the further sum of five hundred thousand dollars on the 10th day of February, 1890; that by the terms of said sale said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of said Topeka Water Supply Company and entitled to the possession thereof on the payment of the balance of the purchase-money as then agreed. That upon said payment of all of said purchase-money, said stock was to be delivered to the said firms of Coffin & Stanton and Woodbury & Moulton; said firm of Woodbury & Moulton to own an undivided interest in said stock, and said firm of Coffin & Stanton to own the other remaining undivided interest in

said capital stock; that further, by the terms and conditions
134 of said sale and contract, the said purchasers were entitled to the incomes and profits on the water works after the first day of January, 1890, and that since said first day of January, 1890, said water works have been managed, operated and controlled for the benefit of said purchasers, and all incomes and profits accounted for to them.

This defendant therefore submits that said William H. Moulton, Theo. C. Woodbury and Edward H. York are necessary and indispensable parties to this suit, and ought to be, but are not, made parties to said bill. All which matters and things this defendant avers to be true, and it pleads the said matters and things to said complainant's bill, and prays the judgement of this honorable court as to whether it should be compelled to make further and other answer to said bill, and prays to be hence dismissed, with its costs and charges in that behalf most wrongfully sustained.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for Defendant The Topeka Water Company.

We, A. A. Hurd & J. D. McFarland, counsel for The Topeka Water Company, one of the above-named defendants, certify that, in *my* opinion, the above and foregoing plea is well founded in point of law.

A. A. HURD,
J. D. McFARLAND, *Counsel.*

UNITED STATES OF AMERICA, }
State of Kansas, County of Shawnee, } *ss:*

Joab Mulvane, of lawful age, being first duly sworn, on oath deposes and says, that he is president of the Topeka Water Company, and that he has read the foregoing plea, and that the matters and things set out in said plea are true in point of fact, and further saith not.

JOAB MULVANE.

Sworn to before me and subscribed in my presence this first day of March, A. D. 1890.

[SEAL.] ELIAS SHULL,
Notary Public, Shawnee Co., Kas.

Term ends March 17, 1892.

135 Indorsed: No. 6148. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiff-, *vs.* Joab Mulvane *et al.*, defendant-. Plea of the Topeka Water Company. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, E. Hagan, Hurd & Dunlap, J. D. McFarland, sol'rs for def't-, Topeka, Kansas.

In the Circuit Court of the United States for the District of Kansas.

Answer of The Topeka Water Supply Company, one of the defendants, to the bill of complaint of George P. Wescott and Samuel Hanson, complainants.

This defendant now, and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer thereunto, it answers and says:

This defendant admits that, prior to the 12th day of November, 1889, it was a corporation, duly organized and existing under and by virtue of the laws of the State of Kansas, and avers that it still is and exists as such a corporation; further, defendant admits that the city of Topeka, by virtue of an ordinance theretofore passed, had granted to this defendant the right and privilege of supplying the city of Topeka and the citizens of said city with water, for a period of time in said ordinance named, and the right to extend its pipes throughout any and all streets, avenues, alleys and public grounds of said city, for the purpose of distributing water, and that prior to said time it had constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also possessed and owned an engine-house grounds, appliances and wells, and was engaged in supplying water, by means of its said appliances, throughout said city, and that its said plant and property was valuable, and its operation profitable; further, defendant avers, that it continued to own and possess said property up to and until the time it conveyed the same to the Topeka Water Company, as hereinafter stated.

This defendant further says, that it has no knowledge respecting the transactions alleged in said bill to have taken place between said complainants and said defendant, Joab Mulvane; but it is informed and believes and therefore charges the fact to be that said complainants and said Mulvane never entered into any valid and binding contract with respect to the sale of said stock by said Mulvane
136 to said complainants; that if said complainants and said Mulvane ever had any negotiations looking to the formation of a contract for the sale of said stock, the said complainants, before said contract was consummated, refused to enter into any contract with said Mulvane of the nature and character contemplated by said parties during said negotiations, and that in consequence thereof the said Mulvane notified the said complainants that he withdrew his propositions that he had made them respecting the sale of said stock, and that he would go no further with said negotiations.

This defendant further avers, that it is informed and believes, and therefore charges the fact to be, that after the said Joab Mulvane had withdrawn his propositions made to said complainants respecting the sale of said stock, and notified said complainants thereof, said

Joab Mulvane did, on the 18th day of December, 1889, and prior to the commencement of this suit, sell all of the capital stock of this defendant to Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners under the firm name of Coffin and Stanton, defendants herein, and William P. Moulton, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton; that said two firms were not and are not partners in the purchase and ownership of said stock, but were and are joint purchasers and owners thereof, each of said firms purchasing and owning an undivided interest in said shares of stock; that neither of the aforesaid purchasers at any time prior to the purchase of said stock had any notice or knowledge of the pretended claims of said complainants set up in their bill of complaint, but purchased said stock in good faith for a valuable consideration, and did, on the 18th day of December, 1889, pay to said defendant, Mulvane, fifty thousand dollars as part of the purchase-money of said stock, and entered into an agreement to pay this defendant the further sum of five hundred thousand dollars on the 10th day of February, 1890, at which time said stock was to be delivered to the said firm of Coffin & Stanton and the said firm of Woodbury & Moulton, as joint owners of the same; that by said purchase on said 18th day of December, 1889, said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of this defendant, and entitled to the possession thereof on the payment of the balance of the purchase-money as then agreed; that by the terms of said sale of said stock the said Coffin & Stanton and said Woodbury & Moulton were on the first day of January, 1890, entitled to the incomes and profits of said water works, and that since said first day of January, 1890, said water works has been managed, operated and controlled in the interest of and for the benefit of said Coffin & Stanton and said Woodbury & Moulton, and all incomes and profits accounted for to them; that said Woodbury &
137 Moulton and said Coffin & Stanton, purchasers of said stock, and the said defendant, Joab Mulvane, were on the 10th day of February, 1890, and still are, willing and desirous to deliver said stock and pay said purchase-money and close up said sale in accordance with the terms thereof, and would have done so on the 10th day of February, 1890, had they not been prevented by said temporary restraining order and injunction issued herein; but that said purchasers insisted and are insisting upon their rights under and by virtue of said sale and the closing up of said matter as soon as the same can be done.

That said Woodbury & Moulton and said Coffin & Stanton deemed it desirable that the franchises and property of this defendant should be transferred to and placed in the possession of a corporation with a greater capital stock than provided for by the charter of this defendant, and accordingly at the request and suggestion of said Coffin & Stanton and said Woodbury & Moulton and for their benefit, the Topeka Water Company was organized, and thereafter the city council of the city of Topeka passed an ordinance authorizing the conveyance to said The Topeka Water Company of all

the privileges and franchises granted to this defendant by ordinance of said city, and in accordance with the terms thereof a conveyance was made and duly executed by this defendant of all its property and franchises to said The Topeka Water Company, which was duly delivered, and a copy thereof, together with the acceptance of said ordinance, filed in the clerk's office of the city of Topeka, as required by the terms of said ordinance, all of which was done prior to the commencement of this suit; this defendant says he is informed and believes, and therefore charges the fact to be, that after the organization of said The Topeka Water Company, said company executed its first mortgage to secure the payment of its first-mortgage bonds to the amount of one million five hundred thousand dollars upon all the property and franchises so as aforesaid conveyed to it; which said mortgage was delivered to the Atlantic Trust Company, a corporation duly organized and existing in the State of New York, and a citizen of the State of New York, as trustee; that said The Topeka Water Company also executed five hundred thousand dollars of said first-mortgage bonds, and was ready to deliver the same to the said Atlantic Trust Company as such trustee, which trustee was ready to certify and deliver to the parties who had agreed to purchase the same, and the same would have been so delivered had not said delivery been prevented by the temporary injunction and restraining order issued in this suit; that this defendant is informed and believes and charges the fact to be, that said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street,
138 and each of them, are citizens and residents of the State of New York; that said William H. Moulton, Theo. C. Woodbury and Edward York are each residents of the city of Portland, and are each citizens of the State of Maine, and were such citizens at and before the time of the commencement of this suit, and that said parties last named herein are necessary and indispensable parties to this suit.

This defendant, in addition to the foregoing answer, submits whether or not the said complainant is, by reason of the matters and things in said bill contained, entitled to any relief as against this defendant, and claims the same benefit by reason thereof and in like manner as if it had demurred to the said bill for want of equity.

Further, this defendant says that said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, partners as Coffin & Stanton, and said Atlantic Trust Company, although made parties to this bill, had not been served with subpœnas, and that said William H. Moulton, Theo. C. Woodbury and Edward York, partners as Woodbury & Moulton, were not made parties to the bill of complaint, and this defendant submits whether or not said parties, or some of them, are not necessary and indispensable parties to said bill, and claims the same benefit and advantage by reason of any defect in said bill for want of parties, in like manner as if it had pleaded to the same.

Further, this defendant denies all and all manner of unlawful combinations and fraud charged against it in said bill, and further

answering, denies all and every the matters and things in said bill contained material and necessary for it to make answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied.

All of which matters and things this defendant is ready — willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for Defendant The Topeka Water Supply Company.

Indorsed: No. 6148. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiffs, *vs.* Joab Mulvane *et al.*, defendants. Answer of the Topeka Water Supply Company. Filed Mar. 3, 1890. Geo. W. Sharitt, clerk. Williams & Dillon, Eugene Hagan, Hurd & Dunlap, J. D. McFarland, sol'rs for def't, Topeka, Kansas.

139 *Opinion.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

THE COURT: I cannot say that I intend now to pass upon what would be the effect upon the jurisdiction of this court if these parties were allowed to come in as parties and set up their rights and interest in the subject-matter of this controversy. But if I should require the complainants to bring them in, as parties defendant to their bill, and it should be made to appear to the court that they were citizens of the same State as the complainants, then the jurisdiction of this court is at an end. I suppose there can be no controversy upon that question; that is, assuming that they are necessary parties, and of course I would not make an order unless they were necessary parties.

The question as to the jurisdiction of this court which would be presented by these parties coming in as intervenors—not as parties defendant to the bill, but as intervenors—interested in the subject-matter of the controversy, and setting up their rights in a cross-bill, is another question. I am not fully prepared to say whether it would oust the jurisdiction of the court or not. There might be a separable controversy still in the case, an independent controversy, between citizens of different States, which possibly might confer jurisdiction upon this court to determine. But that the practice for parties who seek to come into a case like this, is for them to come in as intervenors and set up their rights by bill in the nature of a cross

bill, when they disclose an interest on their own motion, I do not have any doubt. If it should appear from the face of the complainants' bill that they had omitted an indispensable party, or necessary party, then the court would require the complainants to bring the party into court or would not entertain the bill. But where this information comes from an outside party, a third party, setting up an interest in the subject-matter of the controversy, that is quite a different question.

There are only two ways for these parties to come in: either to be made parties defendant in this bill or intervene. That is apparent, because, otherwise, if they should come in and seek to set up their interest in an answer without having been made parties to the bill, how are the issues to be made up? In the equity practice, no special replications are allowed; it can be only a general replication. So, you see, as indicated by Chancellor Cooper, it is impossible to make up the issues unless they are brought in as parties defendant to the bill, or come in independently and set up their rights by cross-bill.

I am satisfied the proper practice in a case of this kind, where it is not disclosed on the face of the bill that there are other parties indispensable or necessary, is to permit the parties to intervene and come in and set up their interest in the subject-matter.

Now, so much having been determined, that practically disposes of this motion, if I understand it, and I will have to overrule this application in the shape in which it comes up. However, I will say, if it is arranged in the shape of an application to file a cross-bill, I will entertain the application; but that possibly might hinge upon the question that would arise as to the jurisdiction of the court. Then, under the 47th rule, it would be discretionary with the court, even if they were necessary parties, to proceed without their presence, saving their rights. But as the rule suggests, this question can be presented to the court when the time arrives, and there is time enough when the question is presented.

The motion to make the parties defendant, as it is made here, is overruled.

Indorsed: No. 6448. Opinion. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas*, } ss:

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, Monday, the 25th day of November, 1889, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, *March* 3, 1890.

GEO. P. WESCOTT ET AL. vs. JOAB MULVANE ET AL. } 6448.

Now comes said complainants by Rossington, Smith & Dallas, their solicitors, and thereupon comes on for hearing the application filed by Wm. H. Moulton, Theo. C. Woodbury and Edward York, partners as Woodbury & Moulton, to be made parties defendant in the above-entitled suit, the said Woodbury & Moulton appearing, — Williams & Dillon, Hurd & Dunlap, J. D. McFarland and Eugene Hagan,
141 their solicitors, and upon affidavits being read by the said Woodbury & Moulton and upon arguments of counsel, said application is submitted to the court, and the same being fully considered by the court, said application is denied.

Opinion.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants, vs. JOAB MULVANE ET AL., Defendants. }

THE COURT: I do not think that this court is bound to anticipate that some other person is a necessary party unless they come in and assert it. Here is the property within the jurisdiction of this court; the parties cannot resort to any other tribunal to stop the transfer, and this court could not consider the anticipation or possibility of some citizen in another State having some interest.

There is, however, a difficult question involved in this case. It is very much in anticipation after all, and that is the one I have suggested. You have discussed this on its various bearings and have discussed it fully.

Perhaps I should say that in a question of this kind we do not sit to determine the ultimate rights of the different parties, upon a hearing for a temporary injunction, or to determine close questions of law or fact. We cannot do it upon a summary hearing such as is usual in an application for a temporary injunction. We have to determine, however, whether the complainants in this case have what appears to be a contract; that is something *prima facia* showing a contract for the sale of this stock and franchise. If this is not a contract, then, of course, the complainants have no remedy either in law or equity for a claim for breach of the contract. That is the end of the case, in whatever tribunal it is brought, whether in law or equity.

Of course, I am not now deciding what may require a further examination or more careful examination in the future; but I am impressed with the conviction that this agreement between these parties contains all the essential elements of a contract. The proposition is made by the vendor to sell this property upon certain terms,

payments to be made at specific times, in specific amounts and at a certain place named. It is true, they say, that there is to be
142 a further contract made, a more definite contract made, and yet it seems to me that the written contract presented here contains all the essential elements of a contract between the parties, for a breach of which either party would have a remedy somewhere, either in law or equity. I am aware of the rule established and well settled in the law that where anything essential remains to be done and determined that the contract is not consummated and perfected. The other rule is equally true, if a contract contains all the essential elements necessary to constitute a complete contract, it is good, whether carried out more minutely in a subsequent contract or not. The contract in writing, so far as it goes, is presumed to embody all the understandings between the parties.

There has been some talk here about Mr. Mulvane saying, "You must trust me to take this money and rely upon my personal responsibility." The writing does not say so. The writing says the money is to be paid at a certain bank and the stock is to be delivered there. Now, it seems to me that a fair inference between business men, under a stipulation of that kind, would be that that bank was to be the custodian, or the bailee, of the money on the one hand and of the stock on the other. That is the way it would impress the casual observer in reading that over. That did not look as if it was entirely the intention of these parties to just take Mr. Mulvane's word. Neither was it obligatory upon the vendees to keep trying and trying to fix up a contract to suit Mr. Mulvane. Mr. Mulvane was bound, in equity, to be frank and fair with these people. He had no right to resort to any subterfuge to get out of his contract. He could not sit by and say "That will not suit me" and "This will not suit me." That will not be permitted; he has got to act in a spirit of fairness and candor and frankness, and endeavor, in good faith, to reach a complete understanding as to all the minutia as to how this contract was to be carried out. I am not impressed, from the evidence in this case, that Mr. Mulvane did that. But, as I said before, I think that the written contract fairly embodies all that is necessary to make it binding upon the parties.

The next question is whether these parties have a right to come into a court of equity and ask for a decree of specific performance. You gentlemen do not disagree very much as to what the law is on that question. In the case of a contract for the sale of goods or chattels, or the stock of corporations which can be purchased in the open market, the rule seems to be well settled, both in this country and in England, that the parties must resort to their action at law for damages; but where, by reason of the peculiar nature of the property sold, the parties cannot have a complete and adequate remedy at law, then quite often, in the discretion of the courts of chancery, they will decree a specific performance of the contract.

143 The stock of this corporation in controversy was not known on the stock markets; it had no value that could be quoted; the parties could *could* not go into the open market and buy any of this

property. So that this case does not come within that well-settled rule. Of course it is a very close question whether the parties would not have an adequate remedy at law. They allege that they can show that this stock had no market value, and would not be permitted to show this particular sale to fix its value.

There is a good deal of force in that and the rule is that we permit parties to show the market value of property. But yet, I do not care to say very much about that, because it may be in the future these parties will have to resort to an action at law.

But these two questions have not troubled me very materially, not so much as this other question that has been raised. A specific performance cannot be decreed, under the law, either for the conveyance of real estate or personal property, when the vendor has put it beyond his power to make a conveyance; neither will it be decreed where the rights of *bona fide* purchasers have intervened and attach to the property. This is an elementary rule that nobody, I presume, will dispute.

Another question involved in this case is, whether these Maine men, Woodbury & Moulton, who it is claimed here are part purchasers of this property, are necessary parties to the determination of this litigation? If so, that is the end of the jurisdiction of this court, and there are two very serious questions; and yet they are questions that arise in anticipation, but may meet us right at the threshold of this case. So far as the parties before the court now are concerned, I see no difficulty in this court taking jurisdiction of this case. Just what may be demonstrated when an answer is filed and proof taken as to what rights these parties have acquired in this property, whether they have acquired it in good faith, whether it is executory or in part executed, would all be material questions in determining whether this suit can proceed. But I do not see how I can determine those questions intelligently until answers are filed in this case and some testimony taken showing just exactly what has been done with reference to transferring this stock; whether these parties bought it in good faith, whether it is simply an executory contract or a deposit of fifty thousand dollars has been made in the bank, and some stock deposited there and nothing further done, so that the parties would be placed *in statu quo* and sustain no injury, if this decree is made, of course the court now is unable to determine.

141 This court cannot anticipate that there are some parties necessary, absolutely necessary, to the determination of this question, until some parties come forward and make a showing to that effect. If these parties, who it is claimed by Mr. Mulvane, have purchased this stock do not choose to come forward and assert their rights under this contract, but say "We will take our money back," I do not see there would be any difficulty about that. Nobody here has authority to speak for them as yet. And it seems to me that until the rights of these complainants are determined as to this property in some manner, or until other parties come in here and make some showing that they have acquired rights in good faith or that other parties are necessary which will oust the jurisdiction of this court, it is the duty of this court to say that this property must re-

main in the status that it is now in, until such facts are made to appear.

Of course this may be somewhat of a risky experiment for the complainants in this case, because they have certainly got to give a bond for all damages that the parties sustain. I am rather impressed with the belief that there is a proper and adequate remedy at law; that is, I do not see any serious obstacle in the way of it myself. But yet I must concede that the complainants have the right to come in here and insist, if the law gives it to them, upon a specific performance of this contract.

So there will be a temporary injunction granted upon the complainants giving a bond in the sum of seventy-five thousand dollars to be approved by the clerk.

Substantially correct.

C. G. FOSTER.

Indorsed: No. 6448. Opinion. Filed Mar. 7, 1890. Geo. F. Sharitt, clerk.

Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Faucett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Co., Defendants.

And now comes Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company, defendants in the
145 above-entitled suit, and each waiving no rights in the suit, move the court that the temporary injunction heretofore granted and issued in this suit be dissolved at complainants' costs.

WILLIAMS & DILLON,
HURD & DUNLAP,
EUGENE HAGAN,
J. D. McFARLAND,
Solicitors for said Defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott and Samuel Hanson, complainants, *vs.* Joab Mulvane *et al.*, defendants. Motion to dissolve injunction. Filed Mar. 10, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, Hurd & Dunlap, Eugene Hagan, and J. D. McFarland, solicitors for Mulvane *et al.*, Topeka, Kansas.

In the Circuit Court of the United States for the District of Kansas.

The answer of William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, defendants, to the bill of complaint of George P. Wescott and Samuel Hanson, complainants.

These defendants now and at all times hereafter, saving and reserving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer unto, they answer and say:

They admit that they are partners engaged in business under the firm name and style of Coffin & Stanton, in the city and county of New York, in the State of New York, and that they are citizens of the State of New York. Further, these defendants admit that prior to the 12th day of November, 1889, the said defendant The Topeka Water Supply Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and the defendants aver that said Topeka Water Supply Company still is and exists as such corporation. Further, these defendants admit that the city of Topeka, by ordinance theretofore passed, *and*

146 granted to said Topeka Water Supply Company the right and privilege to supply the city of Topeka and the citizens of said city with water for a period of time in said ordinance named, and the right to extend its pipes throughout any and all streets, avenues, alleys and public grounds of said city, for the purpose of distributing water, and that prior to said time said Topeka Water Supply Company constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also that it possessed and owned an engine-house, grounds, appliances and wells, and was engaged in supplying water by means of said appliances, throughout said city, and that said plant and property was valuable and its operations profitable; and these defendants aver that said Topeka Water Supply Company continued to own and possess said property up to and until the time it conveyed the same to the Topeka Water Company, as hereinafter stated.

These defendants further say that they have no knowledge respecting the transactions alleged in said bill to have taken place between said complainants and said defendant, Joab Mulvane, but they are informed and believe, and therefore charge the fact to be that said complainants and said Mulvane never entered into any valid and binding contract with respect to the sale of said stock by said Mulvane to said complainants; that if said Mulvane and said complainants had any negotiations looking to the formation of a contract for the sale of said stock, said contract was never consummated, and the said complainants, before any contract was consummated, refused to enter into any contract with said Mulvane of the

nature and character contemplated by said parties during the said negotiations, in consequence thereof said Mulvane notified said complainants that he withdrew his proposition that he had made them concerning the sale of said stock, and that he would go no further with said negotiations; that the negotiations, if any, which took place between said complainants and said Mulvane with respect to the sale of said stock, were only of a preliminary nature and were not *and were not* intended to be or become of binding effect unless a definite and complete contract, embodying all the necessary details and terms of said sale should thereafter be agreed upon and entered into between the said parties; that no such contract was entered into, and that said complainants refused to enter into a contract of the kind and nature contemplated at the time of said preliminary negotiations.

These defendants further say that on the 18th day of December, 1889, and prior to the commencement of this suit, these de-
147 fendants, Coffin & Stanton and the firm of Woodbury & Moulton, a copartnership firm composed of William H. Moulton, Theo. C. Woodbury and Edward H. York, engaged in business under the firm name and style of Woodbury & Moulton, purchased of the said Joab Mulvane all of the capital stock of said Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars, and at said time paid to said Joab Mulvane fifty thousand dollars in cash upon the account of said purchase and as a portion of the purchase price, the payment of the remaining five hundred thousand dollars of the purchase price was extended to the 10th day of February, 1890; that at the time of said purchase, as aforesaid, a written agreement was entered into between these defendants and Woodbury & Moulton on the one part and said Joab Mulvane on the other, by the terms of which said five hundred thousand dollars, the balance of the purchase price of said stock, was to be paid on said 10th day of February, and said stock was to be delivered to these defendants and said Woodbury & Moulton as joint owners of the same; that by said purchase on said 18th day of December, 1889, these defendants and said Woodbury & Moulton, jointly became the owners of all of said capital stock of said Topeka Water Supply Company and entitled to the possessions thereof on the payment of the balance of the purchase-money, as then agreed upon; that by the terms of said sale of said stock these defendants and said Woodbury & Moulton were, on the 1st day of January, 1890, entitled to the incomes and profits of said works, and since said 1st day of January, 1890, said water works have been managed, operated and controlled in the interest of and for the benefit of said Woodbury & Moulton and these defendants, and all incomes and profits accounted for to them. A copy of said written agreement is hereto attached marked Exhibit "A" and made a part hereof.

These defendants further say that there is no partnership relations subsisting between them and the said firm of Woodbury & Moulton, and that the firm of these defendants and of said Woodbury & Moulton is each the owner of an undivided interest in said property, to wit: The said firm of Coffin & Stanton own an undivided one-half inter-

est, and the said firm of Woodbury & Moulton own an undivided one-half interest in said shares of stock, and each of said firms has incurred separate obligations on account thereof.

These defendants further say that they did not at the time they jointly with said Woodbury & Moulton purchased, as aforesaid, said stock, or at any time prior thereto have any notice or knowledge or information of any of the pretended claims of said complain-
148 ants set up in their bill of complaint, or that said complainants had or claimed any rights whatever with reference to said capital stock or the property of said Topeka Water Supply Company or that said complainants had or pretended to have any contract with said Joab Mulvane in regard thereto, but on the contrary, they aver that they jointly, with said Woodbury & Moulton, purchased the same in good faith and for a valuable consideration, and in the belief that they jointly with said Woodbury & Moulton were thereby acquiring a perfect right to the same, and that there was no obstacle in the way of such purchase.

These defendants further say that regarding themselves as virtually the owners of all the property of said Topeka Water Supply Company, by reason of the purchase of all of its capital stock as aforesaid, they have materially changed its condition and have incurred large obligations on account thereof; that the capital stock of said Topeka Water Supply Company not being sufficient to allow of a mortgage for future extensions deemed advisable, under the direction of these defendants a new company was incorporated in their interest with a capital stock of one million five hundred thousand dollars, and known as the Topeka Water Company; and thereafter the city council of the city of Topeka was requested to and did pass an ordinance authorizing the conveyance to the Topeka Water Company of all the privileges and franchises granted to the Topeka Water Supply Company by ordinance of said city; and afterwards, on the 31st day of January, 1890, in accordance with the terms in said ordinance, a conveyance was made and duly executed by the Topeka Water Supply Company of all its property and franchises to the said The Topeka Water Company, which deed was duly delivered and a copy thereof, together with the acceptance thereof, filed in the clerk's office of the city of Topeka, as required by the terms of said ordinance; that afterwards, on the 1st day of February, 1890, in pursuance of proper resolutions, a mortgage of one million five hundred thousand dollars was executed by said The Topeka Water Company and was delivered to said defendant The Atlantic Trust Company of New York, as trustee; that said trustee accepted said trust and accepted said mortgage and forwarded the same to the register of deeds at Topeka, Kansas, to be recorded; that these defendants also procured the bonds of the new company to be lithographed and sent the same to the officers of the new company, at Topeka, Kansas, to be signed and executed, and five hundred thousand dollars of said bonds were signed and were ready to be delivered, and would have been delivered, had not such delivery been prevented by the temporary injunction and restraining order issued in this suit;

and these defendants aver that they had devoted a great
149 deal of their valuable time and experience and have expended much money in bringing this property and these securities to the attention of persons who are likely to invest in such property and securities, and thereby have largely added to the commercial value of the same, and these defendants believing in good faith that they were entitled to said bonds, offered the same for sale to their customers and sold two hundred thousand dollars of said bonds, and the said firm of Woodbury & Moulton also sold one hundred thousand dollars thereof for immediate delivery after the 10th day of February, 1890; and these defendants aver that their firm and said Woodbury & Moulton have respectively obligated and bound themselves by contracts binding on them in law to deliver the bonds sold by them as aforesaid, to the respective purchasers thereof immediately after the said 10th day of February, 1890, and said respective purchasers now insist that these defendants and said Woodbury & Moulton perform their said contracts to deliver said bonds, and unless these defendants are able to perform their said contracts for the delivery of said bonds they will be subjected to grave damages and will also be greatly injured in their mercantile credit and standing; and defendants further aver that they and said Woodbury & Moulton procured the residue of the purchase price of said property, to wit, five hundred thousand dollars, and had the same ready to pay on said 10th day of February, 1890, and were ready to receive said stock; and that all of the aforesaid steps were taken and things done by these defendants before they had any notice or knowledge of the pretended claims of said complainants set up in this suit.

These defendants further say that they now have said five hundred thousand dollars on hand for the purpose of paying the balance of the purchase price of said stock, and that they insist and demand that the stock so purchased by them shall be delivered, that said bonds shall be delivered to said Atlantic Trust Company, and that they shall be secured in the benefit of their purchase and protected in the claims of the parties to *and* whom they have sold bonds, as aforesaid.

These defendants further say that they and each of them are residents of the city of New York and of the State of New York, and that they and each of them are citizens of the State of New York, and were such citizens at and before the time of the commencement of this suit; that said William H. Moulton, Theo. C. Woodbury and Edward H. York, who are the persons composing the aforesaid firm
of Woodbury & Moulton, and each of them are residents of
150 the city of Portland and the State of Maine, and each of them are citizens of the State of Maine, and that they and each of them were such citizens at — before the time of the commencement of this suit.

These defendants in addition to the foregoing answer, submit whether or not the said complainants are by reason of the matters and things in said bill contained, entitled to any relief as against these defendants herein, and claims the same benefit by reason

thereof, and in like manner as if they had demurred to said bill for want of equity.

These defendants aver that said William H. Moulton, Theo. C. Woodbury and Edward H. York, partners as Woodbury & Moulton, are not made parties to the bill of complaint, and submit whether or not said parties are necessary and indispensable parties to said bill, and claim the same benefit and advantage by reason of any defect in said bill for want of parties as if they had pleaded the same.

Further, these defendants submit whether or not this court has any jurisdiction to hear and determine any of the matters and things in controversy in this suit, and claim the same benefit and advantage as if they had demurred to said bill for want of jurisdiction or had pleaded the same.

Further answering, these defendants deny all and all manner of unlawful combinations and fraud charged against them in said bill, and deny all and every the matters and things in said bill contained material or necessary for them to make answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied; all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court may direct; and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for the Defendants Coffin & Stanton.

EXHIBIT "A."

Copy.

This agreement, entered into this, the eighteenth day of December, eighteen hundred and eighty-nine, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Coffin & Stanton, of New York city, and Woodbury & Moulton, of Portland, Maine, party of the second part:

Witnesseth, that in consideration of fifty thousand ($50,000) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thou-
151 sand ($50,000) dollars being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars, to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six (6%) per cent. per annum, from January first, eighteen hundred and ninety, by said party of the second part. The party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas; and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company, and the organization of and issuance of stock and bonds by a new company, if desired; said plan to be formulated by

the party of the second part. Said stock and bonds so issued to be delivered to the party of the second part by the party of the first part upon receipt of said purchase price, viz., five hundred and fifty thousand dollars; all expense of such issuance of stock and bonds to be borne by the party of the second part; it being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Co. on and after January first, eighteen hundred and ninety, shall be paid out of said revenue. It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then in that event the party of the first part hereby agrees to give the party of the second part a reasonable extension of time to make such payment of five hundred thousand ($500,000) dollars.

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Copy.
Executed in triplicate. New York city, December 18th, 1889.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson *vs.* Joab Mulvane *et al.* Answer of Coffin & Stanton. Filed Mar. 25, 1890. Geo. F. Sharitt, clerk.

152 *Motion to Dissolve Injunction.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, Partners Doing Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, defendants in the above-entitled suit, and waiving no rights in the suit, move the court that the temporary injunction heretofore granted and issued in this suit be dissolved at complainants' cost.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for Defendants Coffin & Stanton.

Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al.* vs. Joab Mulvane *et al.* Motion. Filed Mar. 28, 1890. Geo. F. Shartt, clerk.

Affidavit of Joab Mulvane.

In the Circuit Court of the United States for the District of Kansas.

George P. Wescott and Samuel Hanson, Complainants,
vs.
Joab Mulvane et al., Defendants.

State of Kansas, *County of Shawnee,* } ss:

Joab Mulvane, of lawful age, being first duly sworn, says that he is one of the defendant- in the above-entitled suit; that the paper hereto attached, marked "A," is a full, true and correct copy of the written contract of sale entered into between this affiant and the firm of Coffin & Stanton and the firm of Woodbury & Moulton, on the 18th day of December, 1889; and further affiant saith not.

JOAB MULVANE.

Subscribed and sworn to before me this 27th day of March, A. D. 1890.

[SEAL.] ALFRED G. BASS,
Notary Public.

My term expires July 20, '93.

153 Exhibit "A."

Copy.

This agreement, entered into this the eighteenth day of December, eighteen hundred and eighty-nine, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Coffin & Stanton, of New York city, and Woodbury & Moulton, of Portland, Maine, party of the second part:

Witnesseth, that in consideration of fifty thousand ($50,000) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thousand ($50,000) dollars, being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six (6%) per cent. per annum from January first, eighteen hundred and ninety, by said party of the second part, the party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas; and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company, and the organization of and issuance of stock and bonds by a new company, if desired; said plan to be formulated by the

party of the second part. Said stock and bonds so issued to be delivered to the party of the second part by the party of the first part upon receipt of said purchase price, viz., five hundred and fifty thousand dollars; all expense of such issuance of stock and bonds to be borne by the party of the second part; it being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Co. on and after January first, eighteen hundred and ninety, shall be paid out of said revenue. It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then, in that event, the party of the first part hereby agrees to give the party of the second part a reasonable extension of time to make such payment of five hundred thousand ($500,000) dollars.

154

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Copy.
Executed in triplicate.
New York city, December 18th, 1889.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson *vs.* Joab Mulvane *et al.* Affidavit. Filed Mar. 28, 1890. Geo. F. Sharitt, clerk.

Notice of Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, Partners, Doing Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

To said complainants and Messrs. Rossington, Smith & Dallas, their solicitors:

You are hereby notified that the above-named defendants, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, will, on Thursday, the 3d day of April, 1890, at 10

o'clock a. m. of said day, or as soon thereafter as the same can be heard, present to the Honorable Henry C. Caldwell, judge of the United States circuit court for the district of Kansas, at his chambers, in the city of Little Rock, in the State of Arkansas, motion and application to dissolve the temporary injunction heretofore granted in the above-entitled suit, and will then and there move that said temporary injunction be dissolved at complainants' costs.

You are further notified that the affidavits now on file and to be filed in the cause, and the other documents, records and files in the suit will be used upon the hearing of said motion and in support thereof.

Dated this 27th day of March, 1890.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for Defendants Coffin & Stanton.

155 The within notice was served on us the 28th day of March, 1890, by delivering a copy of the same to us.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainant.

Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al.* Notice of motion. Filed Apr. 1, 1890. Geo. F. Sharitt, clerk.

Notice of Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Co., Defendants.

To the said complainants and Messrs. Rossington, Smith & Dallas, their solicitors:

You are hereby notified that the above-named defendants, Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Company and each of them, will, on Thursday, the 3d day of April, 1890, at 10 o'clock a. m. of said day, or as soon thereafter as they can be heard, present to the Honorable Henry C. Caldwell, judge of the circuit court of the United States for the district of Kansas, at his chambers in the city of Little Rock, in the State of Arkansas, a motion and application to dissolve the temporary injunction heretofore granted in the above-entitled suit, and will then and there move that said temporary injunction be dissolved at complainants' costs.

Further, you are notified that the affidavits now on file in the

cause and the other records, documents and files of the suit will be used upon the hearing of said motion and in support thereof.

Dated this 17th day of March, 1890.

A. L. WILLIAMS,
J. D. McFARLAND,
HURD & DUNLAP, AND
E. HAGAN,
Solicitors for the Above-named Defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company.

156 We hereby accept service of copy of above notice this 17th day of M'ch, 1890.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. Notice of motion. Filed Apr. 1, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Compl'ts,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY CO., THE TOPEKA Water Co., Coffin & Stanton, and The Atlantic Trust Co., Def'ts.

Before Hon. Henry C. Caldwell, circuit judge of the eighth circuit, at chambers, in the city of Little Rock, Arkansas.

And now come said complainants by Rossington, Smith & Dallas, their solicitors, and also comes Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Co., by A. L. Williams, J. D. McFarland, Eugene Hagan and A. A. Hurd, their attorneys, and also come Coffin & Stanton by Silas B. Jones and J. D. McFarland, their attorneys, and the motion of Coffin and Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant, and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensable party defendant and the plaintiffs being citizens of the same State, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject. It is therefore ordered, considered and adjudged that the temporary injunction granted in this cause by the circuit court on the 13th day of February, 1890, be and the same is hereby dissolved.

April 4, 1890.

HENRY C. CALDWELL,
Circuit Judge of Eighth Circuit.

Indorsed: No. 6448. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al.* Order dissolving injunction. Filed Apr. 7, 1890. Geo. F. Sharitt, clerk.

157 In the Circuit Court of the United States for Dist. of Kas.

GEO. P. WESCOTT & SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

It is agreed that the complainants may this day file any pleadings or papers that they might have filed on April rule day as of that day and of like effect as if filed on that day. Nothing herein to prejudice said defendants unless as herein stated.

J. D. McFARLAND,
E. HAGAN,
A. A. HURD, &
A. L. WILLIAMS,
Att'ys for Defendants.

April 10, 1890.

Indorsed: No. 6448. Stipulation. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Exceptions to the Answer of Defendants, Coffin & Stanton for Impertinence.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Now come said complainants, and except to the answer of the said Coffin & Stanton filed herein, for impertinence. That all of the matter in said answer is impertinent and raises no issue to any of the matters contained in the bill, and should be stricken therefrom, to wit: All the matter in said answer beginning at the words "These defendants," in the fourth paragraph on page third of said bill, down to and including all after said words on page third; all of page four; all of page five; all of page six; all of page seven; all of page eight and the exhibit referred to in said answer and thereunto appended.

Wherefore, said complainants move that all of said impertinent matter be stricken from said answer at said defendants' cost.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

158 Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al* Exceptions to answer of defendants. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, plaintiffs' attorneys, Topeka, Kansas.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Answer of Joab Mulvane, Defendant.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication to answer of Joab Mulvane. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

The replication of George P. Wescott and Samuel Hanson, complainants, to the answer of the Topeka Water Supply Company, defendant.

These repliants, saving and reserving to themselves all and all
159 manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto, saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication to answer of the Topeka Water Supply Company. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Order Book "E," page 615, April 10, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.) 6448.
JOAB MULVANE ET AL., Defendants.)

Now come said complainants by Rossington, Smith & Dallas, their solicitors, and set down the plea of the Topeka Water Company, filed herein for hearing at the rule day in May, or as soon thereafter as the same can be heard, as to whether said plea is or is not sufficient in point of law.

Motion.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.)
JOAB MULVANE ET AL., Defendants.)

Now come said complainants and move the court here for an order referring the exceptions of complainants to the answer of Collin & Stanton herein, for impertinence, to —— —— as master in chancery of the court.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Motion for reference. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

160 In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.)
JOAB MULVANE ET AL., Defendants.)

Now come said complainants, by Rossington, Smith & Dallas, their solicitors, and dismiss the bill of complaint herein as to the Atlantic Trust Company, and direct the clerk to enter said order of dismissal upon the order book.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Order of dismissal as to the Atlantic Trust Co. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Know all men by these presents, that we, George P. Westcott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts, hereby constitute and appoint Rossington, Smith & Dallas, of Topeka, Kansas, our true and lawful attorneys for us and each of us, in our names and stead, to sign, execute and deliver for us as principals a certain injunction bond for the penal sum of seventy-five thousand dollars, dated May 23, 1890, with A. J. Tullock and W. M. B. Lee as sureties, in a certain cause pending in the circuit court of the United States, at said Topeka, wherein we are complainants and Mulvane and others are defendants, and we hereby adopt and confirm the signing of said bond as above already done, and agree to be bound thereby fully, as if made by ourselves, and do hereby declare that our said attorneys had full power and authority in the premises.

Hereby granting out said attorneys full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and we do hereby fully confirm and adopt all acts done for us and in our respective names, by our said attorneys in the premises prior to the actual execution of these presents by us.

In witness whereof, we hereto set our hands and seals May 28th, 1890.

GEO. P. WESCOTT.
SAM'L HANSON. [SEAL.]

161 MASSACHUSETTS, } ss:
Suffolk, }

AT BOSTON, *May* 28, 1890.

Personally appeared said Samuel Hanson, to me known, and acknowledged the foregoing instrument by him subscribed, to be his free act and deed. Before me,

JOHN R. BALLARD, [SEAL.]
Notary Public.

MAINE, } ss:
Cumberland, }

AT PORTLAND, *May* 28, 1890.

Personally appeared said George P. Westcott, to me known, and acknowledged the foregoing instrument, by him subscribed, to be his free act and deed. Before me,

NATHAN CLEAVES, [SEAL.]
Notary Public.

Know all men by these presents, that we, George P. Wescott and Samuel Hanson as principals, and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties, are held and firmly bound unto Joab Mulvane, the Topeka Water Supply Company, a corporation, the Topeka Water Company, a corporation, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, a corporation, in the sum of seventy-five thousand dollars ($75,000), lawful money of the United States, for the payment of which well and truly to be made, we bind our-

selves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that, whereas, in a certain suit pending in the circuit court of the United States for the district of Kansas, wherein the said George P. Wescott and Samuel Hanson are complainants, and the said Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and The Atlantic Trust Company are defendants, a temporary restraining order was, upon the filing of the bill in said suit, granted and issued against said defendants, and afterwards and on the 13th day of February, 1890, it was ordered by said court that upon said complainants giving a bond to be approved by the
162 court in the sum of seventy-five thousand dollars within two days thereafter, (conditioned that the said complainants should pay all damages to the said defendants against whom said injunction was granted resulting from the granting of said restraining order, and said injunction provided that it should be ultimately held that said injunction or said restraining order were unlawfully granted,) a temporary injunction should be granted and issued in said suit in favor of said complainants and against said defendants, Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Company, and

Whereas, within the period as aforesaid limited for the giving of said bond, the said complainants applied to the court for an order to deposit with the clerk of said court in lieu of the bond as aforesaid, the sum of seventy-five thousand dollars in cash, which said order was granted, and said sum of seventy-five thousand dollars in cash was thereupon deposited with said clerk, and said money was so received in lieu of said bond, and thereupon, said temporary injunction issued as upon a bond being given, and,

Whereas, upon the application of said complainants as aforesaid for leave to substitute a bond for said cash deposit as aforesaid, leave was granted to give a bond to be approved by the court, and upon approval thereof, said complainants should be permitted to withdraw said cash deposit in the hands of the clerk, and,

Whereas, before the filing and approval of said bond last as aforesaid, the said injunction so as aforesaid allowed was, upon motion of certain defendants herein, by one of the judges of said court dissolved.

Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay, or caused to be paid, to the said Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, and to each of them, all damages which they, or either of them, have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said

restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above
163 obligation shall be null and void; otherwise shall be and remain in full force and effect.

In witness whereof, we have hereunto set our hands this 23rd day of May, A. D. 1890.

A. J. TULLOCK,
W. M. D. LEE,
GEORGE P. WESCOTT,
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.
SAMUEL HANSON,
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.

Approved May 24, 1890.

C. G. FOSTER, *Judge.*

STATE OF MISSOURI, }
County of Jackson, } ss:

A. J. Tullock, being first duly sworn, deposes and says that he is worth over and above all debts, exemptions and liabilities, the sum of seventy-five thousand dollars. And further affiant saith not.

A. J. TULLOCK.

Subscribed and sworn to before me this 23rd day of May, 1890.
[SEAL.] HARRY G. CRAIN,
Notary Public, Jackson Co., Mo.

Commission expires June 17, 1891.

STATE OF MISSOURI, }
County of Jackson, } ss:

W. M. D. Lee, being first duly sworn, deposes and says that he is worth over and above all debts, exemptions and liabilities, the sum of seventy-five thousand dollars. And further affiant saith not.

W. M. D. LEE.

Subscribed and sworn to before me this 23rd day of May, 1890.
[SEAL.] HARRY G. CRAIN,
[*Seal.*] *Notary Public, Jackson Co., Mo.*

Commission expires June 17, 1891.

164 Indorsed: No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Injunction bond. Filed June 3, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, }
District of Kansas, } ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth,

in said district on Monday the 2nd day of June, 1890, proceedings were had, and appear of record, in words and figures following, to wit:

TUESDAY, *June 3rd*, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

It is ordered by the court that the clerk turn over to the complainants herein $75,000 which is on deposit in lieu of bond in this suit, a bond for injunction having been substituted and filed. Continued.

TUESDAY, *June 10th*, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

Leave is hereby given by the court to plaintiff to withdraw exceptions to defendants' answer and takes leave to reply.

SATURDAY, *June 14th*, 1890.

GEORGE P. WESCOTT & SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

This cause came on for hearing on the plea of the Topeka Water Company to the bill of complaint herein, the complainants appearing by W. H. Rossington, their attorney, and the defendant, The Topeka Water Company, by J. D. McFarland, its attorney. After hearing the arguments of counsel the court sustains said plea.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Plea of The Topeka Water Company, Defendant.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

165 These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said plea, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said plea of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said plea contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is

true. All which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication. Filed Jun- 24, 1890. Geo. F. Sharitt, clerk.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Answer of Coffin & Stanton, Defendants.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.
JOAB MULVANE ET AL., Defendants.)

These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied,
166 is true. All which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication. Filed Jun- 24, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.
JOAB MULVANE ET AL., Defendants.)

It is hereby stipulated and agreed by and between the said complainants, by Rossington, Smith & Dallas, their solicitors, and the said defendant, The Topeka Water Company, by J. D. McFarland,

its solicitor, that the said complainants may file a replication to the plea of the said The Topeka Water Company filed herein.

This stipulation is made in pursuance of an agreement made in open court at the time said plea was argued.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

J. D. McFARLAND,
Solicitor for the Topeka Water Company.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al.* *vs.* Joab Mulvane *et al.* Stipulation. Filed June 25, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, complainants' solicitors, Topeka, Kansas.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

It is hereby stipulated by and between the parties hereto that the time within which testimony may be taken in the above-en-
167 titled cause is hereby extended and enlarged to the first day of November, 1890, and that any and all of the parties hereto may take testimony to be used herein for any purpose for which testimony may be used at any time prior to the first day of November, 1890, and that an order to this effect may be made and entered herein.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.

J. D. McFARLAND,
Solicitors for Defendants.

Indorsed: No. 6448. Stipulation. Filed Aug. 25, 1890. Geo. F. Sharitt, clerk.

Order.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Upon good cause shown, and by consent of the parties, it is hereby ordered by the court that the time within which testimony may be taken in the above-entitled cause, is hereby extended and enlarged to the first day of November, 1890, and that any and all of the parties hereto may take testimony in this cause to be used herein for any purpose for which testimony may be used at any time prior to the said first day of November, 1890.

C. G. FOSTER, *Judge.*

August 25, 1890.

Indorsed: No. 6448. Order. Filed Aug. 25, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

It is hereby stipulated by and between the above-named complainants and the said defendant, Joab Mulvane, as follows:

168 1st. This cause shall be continued until the June term, 1891, of this court.

2nd. The time for taking testimony herein is and by order of the court shall be extended and enlarged until the 15th day of May, 1891, but said complainants shall take their testimony-in-chief in this cause before the first day of March, 1891. Defendant shall have until the 15th day of April in chief, and compl'ts until 15th day of May to take their testimony in rebuttal.

3rd. The defendants herein shall not be required to take any testimony in this cause until after the complainants shall have taken their testimony-in-chief, and in case the complainants do not take their testimony before this cause is called for hearing then complainants' bill herein shall be dismissed.

4th. This cause shall be submitted and heard before the full bench of the court.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.
A. L. WILLIAMS,
J. D. McFARLAND,
Sol'rs for Defendant Joab Mulvane.

Indorsed: No. 6448. Stipulation. Filed Oct. 7, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

It is hereby stipulated in the above-entitled cause, between the complainants and defendants, Coffin & Stanton, and The Topeka Water Supply Company and The Topeka Water Company, as follows:

169 1. The complainant hereby dismiss their bill as to the above-named defendants, Coffin & Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them hereby waive, release and relinquish, any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.

ROSSINGTON, SMITH & DALLAS,
Sol. for Compl'ts.

COFFIN & STANTON,
By SILAS B. JONES, *Their Sol.*
A. L. WILLIAMS,
J. D. McFARLAND,
Sol. for The Topeka Water Supply Company & The Topeka Water Company, Defendants.

Indorsed: No. 6448. Stipulation. Filed Oct. 7, 1890. Geo. F. Sharitt, clerk.

170 In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

Now come the complainants herein by their solicitors, and also the defendants, The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton by their solicitors, and it appearing to the court that the complainants and the said defendants heretofore, to wit, on the 7th day of October, 1890, filed in this cause written stipulation in words as follows, to wit:

It is hereby stipulated in the above-entitled cause, between the complainants and defendants, Coffin & Stanton and The Topeka Water Supply Company, and The Topeka Water Company, as follows:

1. The complainants hereby dismiss their bill as to the above-named defendants, Coffin & Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them hereby waive, release and relinquish any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

171 5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph two hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect

the rights or remedies of Joab Mulvane against complainants, in this or any other action.

It is therefore ordered, adjudged and decreed by the court that the complainants' bill of complaint herein be and the same is now dismissed as to said defendants, The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton, under the terms of and in pursuance of the provisions of said stipulation.

C. G. FOSTER, *Judge.*

Indorsed: No. 6448. Wescott *et al. vs.* Mulvane *et al.* Form of order dismissing as to certain defendants. Filed Nov. 28, 1890. George F. Sharitt, clerk.

In the Circuit Court of the United States in and for the District of Kansas.

George P. Wescott and Samuel Hanson, Complainants, *vs.* Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants.	No. 6448.

In equity and now pending in the 1st division of said district.

And now come as well the complainants herein, by their solicitors, as the said defendant, Joab Mulvane, by his solicitors, and under the terms of, and in pursuance of the provisions of a written stipulation between said complainants and said defendant, Joab Mulvane, filed in this cause on the 7th day of October, 1890, and upon good cause shown, it is hereby ordered, adjudged and decreed by the court that the time within which testimony may be taken in the above-entitled cause be and the same is hereby extended and enlarged to the 1 th day of May, 1891; but said complainants shall take their testimony-in-chief in this cause before the first day of March, 1891; and the defendant, Joab Mulvane, shall have until the 15th day of April, 1891, in which to take testimony-in-chief; and said complainants shall have until the 15th day of May, 1891, to take testimony in rebut-al.

172 And it is further ordered by the court that said cause be and the same is hereby continued until the next term of this court, the same being the June term, 1891.

C. G. FOSTER, *Judge.*

Indorsed: No. 6448. In circuit court United States, dist. of Kansas. George P. Wescott and Samuel Hanson, compl'ts, *vs.* Joab Mulvane *et al.*, def't-. Filed Nov. 28, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, 1890, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY, *December* 12, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON } 6448.
vs.
JOAB MULVANE ET AL. }

It is ordered by the court that H. P. Dillon be and he is hereby appointed special examiner herein.

United States Circuit Court, District of Kansas. In Equity.

GEO. P. WESCOTT ET AL. } No. 6448.
vs.
JOAB MULVANE. }

Pursuant to an order of the court made in the above-entitled suit on the — day of December, 1890, Hiram P. Dillon, master in chancery, was appointed for the purpose of taking testimony. Notice was served upon the solicitors of the various parties in interest that testimony would be taken on behalf of the complainants, in Boston, on Monday, the 16th of February, 1891.

Present: Mr. Charles B. Smith, of the firm of Rossington, Smith & Dallas, representing the complainants, and Mr. A. L. Williams, representing the defendant.

GEO. P. WESCOTT, being duly sworn as a witness for the complainants, testified as follows in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

173 Int. 1. Are you one of the complainants in this case?
A. I am.

2. Where do you live, and what is your general business?

A. In Portland, Maine; my general business is that of owning and managing water-supply corporations.

3. How long have you been engaged in business of that character?

A. 14 years; since 1876.

4. Do you know Mr. Hanson, your co-complainant, and also Mr. Mulvane, the defendant?

A. I do.

5. How long have you known Mr. Hanson?

A. I have known Mr. Hanson 25 years.

6. What is his business at the present time?

A. Mr. Hanson at the present time is in the banking business, and is connected with the Maverick bank.

7. How long have you known Mr. Joab Mulvane?

A. I have known Mr. Joab Mulvane since the 12th of November, 1889; I first met him at Topeka, November 12, 1889.

8. What occasion had you, if any, for going to Topeka at that time, or why did you go?

A. The occasion of my visit to Topeka was at the instance of Mr. Hanson, who informed me that there was a water-works plant in Topeka which he had an intimation from Mr. Mulvane could be purchased; we went there for the purpose of meeting Mr. Mulvane and for the purpose of purchasing the water works at Topeka.

9. When was the first time that you had an interview with Mr. Hanson with reference to the acquirement of property at Topeka?

A. In October, previous to the November of visiting there.

10. Do you know whether Mr. Hanson had been in Topeka before this time and inspected this property?

A. He had. In the early part of October Mr. Hanson and myself went south as far as Knoxville, and we parted company in that vicinity with the ostensible purpose of his going to Topeka. I might say that while at Knoxville we looked at the plant in Knoxville with the intention of purchasing that, and Mr. Hanson went to Topeka for the purpose of seeing the water works there with a view to purchasing them, as we have associated ourselves for the purpose of purchasing water works wherever we can find them if we can do so at a reasonable price. Mr. Hanson left to go to Topeka and Leavenworth with the ostensible purpose of purchasing those works or seeing if they were for sale.

11. In what water works are you interested in this country?

A. The Portland Water Company, Portland, Maine, with
174 a capital of a million dollars, of which I have been superintendent since 1876; a water company in Springfield, Mo., which is owned by a syndicate of which Mr. Hanson and myself are two; water works at Biddeford and Saco, State of Maine; water works in Rockland, Camden and Thomaston, State of Maine; water works in Augusta and Chelsea, State of Maine; water works in Brunswick, Ellsworth, Bucksport and Calais, State of Maine, and St. Stephens, New Brunswick. Those are the water works in which I am interested, which I constructed, and I am the principal owner of them all.

12. At the time that you and Mr. Hanson met in Topeka had you at your command or under your control the money to make the purchase which you subsequently made?

A. Before going West we arranged with the Maverick bank for any sum of money up to a million dollars that we might require for the purchase of works; we left here for the purpose of visiting Topeka and Denver; we went to Denver first to purchase those works and came back and stopped at Topeka on our return; we had arranged with the bank to furnish us the money we required for the purchase of any plant which we might purchase; we had previously purchased the works at Springfield, Mo., under exactly the same conditions.

13. Was the Maverick national bank at that time in such financial condition that it could furnish such funds if necessary?

A. We thought that they were.

14. What is the financial strength of that institution, if you know?

A. That I could not answer of my own knowledge. I might say, however, that the capital stock is $600,000, and it has a large surplus; more than a million, I think.

15. After going to Topeka did you meet Mr. Mulvane there?

A. I met him there.

16. Whereabouts and when?

A. I met him at his office on the 12th day of November, 1889, in the afternoon.

17. Who were present at that time?

A. Mr. Hanson and myself, with Mr. Mulvane.

18. Now I wish you would go on without specially being interrogated and state what occurred at this interview between yourself and Mr. Hanson on one part and Mr. Mulvane on the other?

A. We went into Mr. Mulvane's office and found him in; another gentleman was present whom he asked to go out of the office, and then Mr. Hanson opened the question of the purchase of the works, and asked if we might examine the works with a view of purchase; he gave his consent and told us how to proceed; that we were
175 authorized in the afternoon to visit the pumping station and see that as much as we wanted, but we were not to go to the office of the company without first seeing him again; we visited the pumping station. We left his office with the understanding that we were to meet the next morning. In the meantime we were to satisfy ourselves with regard to the city, the pumping station and the plant generally, with the understanding that in the morning he would meet us in the office and show us the books of the corporation. We took a ride around the city and visited the pumping station and the next morning we met Mr. Mulvane by appointment and went to the company's office; at that place we were introduced to Mr. O'Brien, the secretary, the books were produced and we were enabled to make such abstracts of the books as we thought fit to take; we had previously been supplied with the quarterly statements of the business of the company and we examined the books for the purpose of testing the quarterly statements. After having made an examination of the books we parted company with Mr. Mulvane with the understanding that he was to come to the hotel in the afternoon at two o'clock; I have forgotten the name of the hotel we were stopping at, but it was just around the corner from Mr. Mulvane's office—just below; a new hotel, looking out on the pumping station; at two o'clock he came to the office with Mr. Shaw, whom he desired, if we purchased the works, to be made superintendent; he was to supersede Mr. O'Brien and take the superintendence of the works. We were introduced to Mr. Shaw and after a short conversation he retired and we opened negotiations directly with Mr. Mulvane, Mr. Hanson did, as to the purchase of the works; Mr. Mulvane's price, after considerable conversation, was made; the statement he made was that he wanted $500,000 for the plant; that was conditioned, of course, that he could secure the stock, which he did not have. Our

proposition at that time was $450,000, and we parted company with the understanding that we were to meet again in the evening at five o'clock, I think, to see whether we could agree on a price and terms; at five o'clock we went to his office and met him and at that point he took us not into his office, but into a private room of the bank which adjoins his office, and there we agreed to pay him his price, $500,000; I took a sheet of paper of the bank and turning to a secretary opposite the window wrote out the proposition as I understood it and the terms we had agreed to, with the understanding, as I supposed at that time, that we were to close the negotiations. After agreeing on the form of the purchase, which was dictated mainly by Mr. Mulvane and Mr. Hanson, I signed the offer, Mr. Hanson signed it, and the paper was passed to Mr. Mulvane for his
176 signature; Mr. Mulvane said, on reflection that he was not quite ready to sign the paper inasmuch as he then had only control of part of the stock and this agreement bound him to transfer and deliver the entire capital stock; he did not think it advisable for him to sign until he actually had the stock in his hands. Therefore, he said he would retain the paper which he had signed and during the next ten days would sign it and return it to us or declare the transaction off. Mr. Hanson remonstrated with Mr. Mulvane, that it was hardly businesslike for us to sign the paper and leave it in his hands and therefore he suggested that we copy the paper which was signed and give him the copy; that he should sign the copy and send it to us, and we would return the paper which we had drawn and signed, our signatures to remain on the paper until he had completed the transaction.

19. You may examine, if you please, this paper which I now hand you, and state whether it is the identical paper which was signed at that time, with the exception of the verification subsequently made?

A. Yes, sir; that is the paper which I made in the office of the bank and which was signed by myself and Mr. Hanson, and of which Mr. Mulvane had a copy at the time.

(Paper offered in evidence and marked "Exhibit A.")

20. How long did you remain in Topeka after this conversation had with Mr. Mulvane that you have testified with reference to?

A. We left the office about half past six, I think, that evening, and if I remember correctly, I left the next morning at four o'clock.

21. After signing this paper was any other agreement made between you and Mulvane at that time?

A. No talk whatever.

22. When was the next time, if ever, you heard from Mr. Mulvane?

A. The next time I heard from him was by a letter which he addressed to me on the 22d of November. That letter reads as follows:

"Topeka Water Supply Co., 625 Quincy St., Topeka, Kansas.

NOVEMBER 22, 1889.

George P. Wescott.

DEAR SIR: I cannot write you anything definite today. Will write you again or may see you, as I expect to be in Boston in the near future, and will advise you when. I am going east as soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

Excuse left-hand writing and brevity."

177 23. How soon after receiving this letter was it before you heard from him again?

A. On December 4th, 1889, I received the following letter:

"Mr. George Wescott, Portland, Maine.

DEAR SIR: I expect to be in Boston by the 14th instant and will call at the Parker house and shall be pleased to meet you.

"Please accept my thanks for your courtesy in sending the form for accounts. I shall be able to talk with you definitely when we meet as to the business matter heretofore canvassed.

"May I congratulate you upon the triumph of Mr. Reed for Speaker. My right arm is yet in limbo and writing a difficult task.

Yours respectfully, JOAB MULVANE."

24. Mr. Mulvane in his letter refers to some accounts that you had sent him; what accounts has that remark reference to?

A. When at the office of the water company I suggested to him that his accounts were not kept in what we considered a first-class manner with eastern water works and that I would send him the system of accounts which had been followed by the Portland Water Company, which I thought he would be glad to adapt for his company. Whether we purchased or not it would be a good thing for him to change his method of keeping his books, and I sent this model on my return to Portland.

25. When again did you hear from Mr. Mulvane?

A. The next was a telegram which I received on December 13th, dated at Boston:

"Will be at Parker house today and tomorrow.

(Signed) JOAB MULVANE."

26. What did you do after the receipt of this telegram?

A. I replied to him that I would meet him on Saturday at 11 a. m. at the Parker house.

27. Did you come to Boston on that day?

A. I arrived here at 11 o'clock and came down to the Parker house and met Mr. Mulvane.

28. Now, will you go on and state what occurred at that interview and who was present, if anybody?

A. In the afternoon about 2.30 Mr. Hanson and myself met him here at the house. We waited for Mr. Mulvane until some time be-

tween two and three, when Mr. Mulvane came and said he had been detained to make a quorum at some railroad meeting which had been held uptown, and apologized for the delay. We at once retired to room 304, on the School Street corner, and proceeded to talk
178 the matter over with Mr. Mulvane. He said that in acquiring the stock of the company, which he did not hold the minority interest, he had found it necessary to pay a much higher price than he anticipated; therefore it was impossible for him to carry out the agreement or the understanding which we had made at Topeka unless we paid a higher price than $500,000. We asked him what that price was and he said it would be $50,000 higher—$550,000. We discussed the matter a good deal and were very much surprised at the advance in price, because we supposed it had been definitely settled at Topeka as to the price which was to be paid, and it was only a question of the terms of the payment to be discussed. Mr. Mulvane insisted on his receiving the extra $50,000 for the reasons which I have stated, and, after considerable discussion, he finally said that, as a compromise, he would make it $525,000, or $525,000. We told him that if that was his ultimatum we would take it and go off for consultation and return as soon as possible, within half an hour, and give him our answer. We went down to the Maverick bank and talked the matter over with Mr. Potter; told him the situation of affairs just as they stood, and the result was that we came back and declined to accede to the request of Mr. Mulvane or change the price in any particular; that we felt that he had agreed to sell us the property for $500,000, and that that sum was for the purchase of the minority of the stock, all of which he said he had in his possession except $12,000, which he expected to have within a few days; that he had acted as our agent and that the stock was ours at the price. We put our coats on and went so far as to open the door to go out of the room, saying to Mr. Mulvane that if that was his ultimatum we had no reason to stay any longer, and the trade was off fully. Mr. Mulvane then said that inasmuch as we had held out to our associates the fact that $500,000 was the purchase price and there was no way that we could explain our position or his advance and could not concede his right to charge $25,000 more, he would meet the terms which he had made at Topeka. We came back, took our coats off, and I sat down at the table and drew a proposition which he signed and we signed. That was what occurred Saturday afternoon.

29. Is this the proposition that you refer to?

A. That is the proposition which I drew.

30. Will you please read it?

A. (Reading:)

"Parker house, School St., corner of Tremont.

"BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of
179 1,000 shares of par value of $100 per share for the sum of $500,000, on the following terms of payment, viz: The sum

of sixty thousand dollars ($60,000) to be paid in cash on the signing of the contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000), to be paid February 10, 1890; one hundred and forty thousand dollars ($140,000) to be paid February 20, 1890, and one hundred thousand dollars ($100,000) to be paid March 20, 1890. Provided that final payment of the last-named sum of $100,000 may be paid on February 20th if said Wescott & Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Massachusetts.

"JOAB MULVANE.

"To George P. Wescott, Samuel Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Co. for the price and on the terms and conditions above named.

GEORGE P. WESCOTT.
SAMUEL HANSON."

31. After the signing of this paper what did you do?

A. It had got to be then about 6.30 in the evening; I was going to Portland on the train which left at seven o'clock, and I left the room and went to Portland. The understanding was that I was to return here on Monday morning to complete the negotiation, the understanding being that we were to meet again at this same place Monday evening.

32. Did you return on Monday morning?

A. I returned on Monday morning and came direct to the Parker house to meet Mr. Mulvane again.

33. Did you see him?

A. I went to his room, No. 63, on the second floor.

34. What occurred there?

A. The room was locked, and not finding either Mr. Hanson or Mr. Mulvane, I went at once to the bank to find out what Mr. Hanson had done in the meantime. He informed me that the money was ready to pay Mr. Mulvane, the amount named in the contract, $60,000. I also saw Mr. Work, the cashier.

35. Never mind what Mr. Work said at present; did you see Mr. Mulvane?

A. I saw Mr. Mulvane at 12.30, at the Parker house, at his room, No. 63; at that time we presented the form of contract which Mr. Hanson had prepared, which was the contract referred to in
180 the memorandum of Saturday, which stipulated for the payment of $40,000 in addition to the $60,000.

36. What did he say, if anything?

A. Mr. Mulvane took the contract, looked at it, and he said that was not in accordance with the former agreement. We said: "Very well, Mr. Mulvane; this is a rough draft and it is for you to say

what changes you will have; we are here to make it to suit you if we can; we have got nothing to do except to carry out the agreement we made on Saturday afternoon." Well, we discussed the matter somewhat of his responsibility, and he said that he was amply responsible for everything to carry out, whether we had any further contract or not. I told him that certainly we were equally responsible as he, and that we were amply able to carry out anything that we agreed, but that did not compass the business that we were there for; that we were there to complete the agreement which was commenced on Saturday, and which he had signed. Finally, we went down to room 304, where we were before, and spent the balance of the afternoon in trying to get Mr. Mulvane to offer some suggestion wherein and how the memorandum which Mr. Hanson had prepared and submitted to him differed from that which we had agreed to make on Saturday, and he absolutely failed to signify in any particular in what way it differed.

37. Did he refuse to make any suggestion with reference to it?

A. He didn't refuse, he simply would not say anything; it was what I call a good, square sulk; it was not a refusal, it was simply a sulk.

38. How long were you gentlemen together on the afternoon of Monday?

A. Until 6:30, or until 6 o'clock, when we left the room; it was about 6:30 when we bid him "Good-bye" in the office.

40. What became of this draft of the subsequent agreement that you had prepared, about which you had conversation on Monday?

A. Mr. Mulvane put it in his pocket in room 63 and *and* kept it there, and when he was going out of room 304 he said to us—"Welll," he says, "Gentlemen, I will declare this whole trade off; I am going to leave you." "Well," I said, "Mr. Mulvane, you will leave that memorandum of agreement?" He says, "No, I won't." He had got out of the door and I went to the door, and I says, "You will." He says, "Haven't you got a copy of it?" "No," I says, "I haven't got any copy of it; that agreement is ours, or a copy of it." He says, "Very well, I will go and get a copy made." He kept
181 the agreement and went out and got a typewriter copy made and gave it to us as a copy of the agreement.

41. Had it been signed by yourself and Mr. Hanson?

A. No, sir; it had not been signed; it was a rough draft of an agreement which we submitted to him for his approval and for such changes as would conform to his views.

42. Well, when did you see Mr. Mulvane again?

A. Never; or never after 6:30, when he left us in the office. After leaving us in the room he came downstairs; he had his coat on and I had mine on; we were going out; he said the trade was all off and that he had no further business to do with us; if we wanted to do any further business with him we could have no interview with him, but any letters we would leave at the Bank of North America with Mr. Burr would reach him. I stated to him that we had not done with him, and we should insist on having the agreement carried out.

43. At whose suggestion was it that the National Bank of North America was made the place where the stock was to be turned over to you and the payments to be made?

A. At Mr. Mulvane's, Mr. Burr being his friend and the man to whom he referred for his financial standing; he was the only man whose name was mentioned by Mr. Mulvane as showing that he was a responsible party.

44. Do you remember about Mr. Mulvane saying anything at the time he signed this agreement dated December 14 with reference to the fact that now the matter was settled as you had his signature, which you had not before?

A. He made that statement; he says—"Gentlemen," he says, "that fixes it," or words to that effect; "you have got my signature now; when you were at Topeka you did not have it."

45. When was that said with reference to the time of signing?

A. That was after the signatures were made, about 6.15 or 6.30 in the evening of Saturday; it was immediately when he signed his name to the paper.

46. What steps did you and your associates take after that towards endeavoring to obtain a compliance on the part of Mr. Mulvane with his contract?

A. The next morning Mr. Potter, at our suggestion, addressed a communication to Mr. Mulvane, which was left or delivered to Mr. Burr to be sent to Mr. Mulvane. Mr. Potter, perhaps, can state better than I can in his affidavit what it was. In substance it was that he thought if he would consent to a conference all the matters could be agreed upon and satisfactorily arranged.

182 47. Did you ever hear from Mr. Mulvane after that?

A. No, I did not.

48. After failing to obtain an interview with Mr. Mulvane, what steps did you and your associates take towards enforcing your rights under your contract?

A. I took the papers home and at once drew off a statement, a copy of which I have in my hand, and submitted all the papers to Judge Symonds, of the firm of Symonds & Libby, of Portland, as to the rights which we had under the negotiations with Mr. Mulvane; Judge Symonds informed me that the contract which we had made was good and sufficient and would be binding on Mr. Mulvane.

49. Do you know any reason why immediate steps were not taken towards filing a bill to enforce the contract?

A. We hoped and believed that after Mr. Mulvane had gone away, got back home and thought it over, we should hear from him, and after all, that the matter would be compromised in some manner which would be equitable and fair to both parties. Therefore we thought it was proper to give him sufficient time to think it over.

50. What steps did you finally take?

A. We finally had a conference here; I came to Boston again and talked the thing over, whether it was desirable to call Mr. Mulvane's attention to the agreement he had made that night, and after consultation we decided that it was best to bring the matter to his atten-

tion; that there was an unsettled matter here that, in fairness and equity, we were entitled to have him take up and complete the negotiations with us; we accordingly made a tender to him through you, of the supplementary contract, asking his signature, and stating that we were ready to carry out our agreement.

51. Did you employ counsel and direct a bill to be filed for specific performance of the contract?

A. We did; we sent the papers to Messrs. Rossington, Smith & Dallas, of Topeka, with the request that they should take such action as would enforce our rights in the matter, and with instructions to proceed forthwith.

52. At the time of retaining us was it your desire and intention to obtain, if possible, a transfer of the entire capital stock of the water company to yourselves under the terms of this agreement?

A. That was the object of the proceedings which we authorized them to commence.

53. Was the bill directed to be filed on your part in good faith to accomplish that?

A. It was; that was what we desired, and we believed that the capital stock of the company was ours, and we instructed
183 you to take any method which would give us possession of the property and the capital stock.

54. Have you subsequently learned that it would be impossible now to obtain that stock?

A. I have now, by reason of the stock having passed into other hands than Mr. Mulvane's.

55. Has that occurred since the filing of the bill?

A. That has occurred since the filing of the bill.

56. How many years' experience did you say you had had in water properties?

A. Since 1876.

57. Are you familiar with the value of water plants of the character of the plant in controversy in this suit?

A. I think I am. I have constructed a very large number of water works and have practically operated them, made that my business, and know, I think, full well the value of any water-works plant after having looked it over.

58. What elements are to be taken into consideration in estimating the value of companies of this kind?

A. The elements which go to make up the value of a plant are the capacity of its pumping plant, the extent of its pipe system and the number of population which is contributory to the pipe system—along the line of the system of the pipes; and, of course, the population which the city or town comprises to which extensions can be made from the existing system in order to obtain additional revenue. Coupled with that would be the income of the plant and its fixed charges for cost of operating and the interest account. Deducting the operating expenses and the interest charges from the gross receipts would give the value of the plant, or the amount of money which would be applicable to the payment of interest on its bonds. Now, on the plant in question at Topeka we found as matter

of fact that the gross earnings of the plant, as shown by the books, were in round numbers, $56,000; the operating expenses were in round numbers $11,000; the interest charges were six per cent. on $120,000. Deducting the $11,000 and the $13,000 from the $56,000 would leave a net revenue in round numbers of $31,000. That would be equal to paying the interest on more than $630,000. That would be, in my judgment, the value of the Topeka plant at the date of the purchase, for which we agreed to pay $500,000.

59. How much, then, do you think that you have been damaged by the breach of this contract on the part of Mr. Mulvane?

A. There was also in addition to the takers who were being supplied, from which the $56,000 revenue was derived, we were shown a large number of streets to which the pipes had been ex-
184 tended the year previous, and main streets where the cross-streets from avenue to avenue had not been piped. I estimated that there was in the city an increase of that revenue of perhaps 25 per cent. in sight, which would add to that some thirteen or fourteen thousand dollars of value, which under the management which we should put into that plant would readily bring the revenue the first year up to $70,000 without any material increase of operating expenses or interest charges. In that event the value of the plant would be $775,000, if funded on a six per cent. basis, instead of $630,000. That is, the right of extension is really the value of the franchise; that is, it is continuous with the growth of the population of Topeka. There would be a continued increase yearly. The franchise would sell for a value beyond the $630,000 and would sell for a value beyond the $775,000.

60. How much would be the value of a franchise of that character in addition to the amount you have estimated?

A. I think the value of the franchise of the city of Topeka to introduce water as stated in that contract was $50,000, as it stood on the day that we made the trade.

61. Have you ever seen a report made by a civil engineer by the name of E. T. Fuller?

A. I think I have, at one time.

62. Have you got what purports to be a copy of a report of that character?

A. I have.

63. I wish you would examine it carefully, or state that you have already examined it carefully, and if, from your previous examinations of the property and the surroundings at Topeka, you can testify as to whether this report of the engineer is a correct and truthful report of the character of the property or not?

A. After examining the report of Mr. Fuller, and comparing his figures with minutes which I took from the corporation's books when I was at Topeka, I believe the statement made over Mr. Fuller's signature to be a fair statement, and, as far as I can see, substantially correct, and one that I should say was fair in every sense of the word.

64. How much of an examination did you make of this property before entering into negotiations with reference to the purchase of it?

A. We made an extended examination of the pumps, the wells, the mode of taking its water, the pipe system as laid down on the maps, its size, the streets on which it laid, and the additions to which the pipes could be extended with a view of future increase of the income of the works; it was as extended as it was possible to make by any one who had not put the works in themselves.

185 65. From such examination will you incorporate the engineer's report referred to as a part of your testimony in the case as to the matters of detail stated in the report, and can you do so, having made a sufficient personal examination of the property to make such statement?

A. Yes, sir; I can. I can say truthfully that that would be my best judgment of the plant, and what I saw there fully coincides with the statement over Mr. Fuller's signature which is lying before me.

66. Will you offer that in evidence as part of your own testimony?

A. I do.

(Report of engineer, marked "Exhibit B.")

67. Was the amount, $500,000, to be paid by yourself and Mr. Hanson to Mr. Mulvane to be exclusive of the incumbrance upon the property, amounting to $120,000?

A. No; the property was to be delivered to us free of all incumbrances; we were to pay him $500,000 for the property.

68. Subject to the mortgage?

A. Subject to the $120,000 mortgage; yes.

69. That was the only mortgage upon the property?

A. That is all; all the floating debt was to be paid.

70. Has he ever complied with that and delivered you the stock?

A. He has not.

71. Have you been ready and willing on your part at all times since entering into this agreement to have paid Mr. Mulvane the amount mentioned at the time specified upon the stock being turned over as provided in the contract?

A. We have; there has been no time when we would not have carried out the agreement as stated in the memorandum which we drew for Mr. Mulvane.

72. What was your intention with reference to making this purchase? Was it to be merely a purchase of the stock of the company or was it to be a purchase of the entire plant itself?

A. The intention was to purchase the entire plant itself; that plant was to be managed by myself for the gentlemen who were associated with me; we were not buying stock, we were buying the plant, to be kept and operated for the future.

73. You were seeking, then, a permanent investment?

A. That is what we were after.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. Mr. Wescott, did you on the 28th day of January, 1890, make an affidavit to be used in the preliminary hearing in this case?

186 A. Yes; I made one.

X 2. Your statements in that affidavit were true, of course?

A. Yes, sir. (Paper handed to witness.) That is it; that is true to the best of my knowledge and belief.

Mr. WILLIAMS: I desire to attach a copy of this affidavit to Mr. Wescott's deposition as an exhibit.

(Marked "Exhibit C.")

X 4. Was there any agreement when you parted with Mr. Mulvane after he had signed this contract as to the mode of paying the $60,000?

A. It was to be paid at the Bank of North America in a New York check.

X 5. That was on Saturday that suggestion was made?

A. Yes.

X 6. There is a preliminary question on a point which I think you did not state in your examination-in-chief. That was one of the changes you made in your Topeka talk, was it not, increasing the amount to be paid from $50,000 to $60,000?

A. My impression is that that is so; that was the amount agreed upon.

X 7. It was originally $50,000, and instead of exacting $50,000 or $25,000 increase, Mr. Mulvane raised the amount from $50,000 to $60,000 that was to be paid then?

A. Yes, sir.

X 8. Did you take any steps to procure that $60,000?

A. I did.

X 9. When?

A. I made the arrangement on Saturday and on Monday I went to the bank and told Mr. Work to remain there; that I would come back for the New York check, and asked him to remain until I came, and he remained until half past 5 at the bank waiting for us to get through the negotiation with Mr. Mulvane, for him to make a delivery of that agreement and for us to make that payment.

X 10. That was on Saturday?

A. No; that was on Monday.

X 11. Did you have the check with you when you went to see Mr. Mulvane with this last contract?

A. I did not.

X 12. Why not?

A. For the reason that we had not completed the agreement, and as soon as we met Mr. Mulvane he declined to discuss, or negotiate, or do anything; but Mr. Work had the check at his office, where we could get it in five minutes without any difficulty.

187 X 13. You did not procure the check itself, then, on Saturday?

A. I did not.

X 14. Nor on Monday?

A. The check was made.

X 15. You did not procure it, I say?

A. No, I did not procure it.

X 16. You did not have it with you?

A. I did not have it with me.

X 17. Did you agree, on Saturday, with Mr. Mulvane, when you would give him the check?

A. No; no agreement. The understanding, or my impression was this, that when he had completed this agreement—what Mr. Mulvane, as I understand, wanted, was first—the agreement on Saturday was a personal agreement with Mr. Mulvane; the one to be completed on Monday was an agreement which he was willing any one should see; the other one was rather a private matter.

X 18. That is not responsive to my question. He was to receive $60,000 during that trip, was he not?

A. To be paid at the Bank of North America.

X 19. At that time?

A. At that time.

X 20. He was not paid that $60,000?

A. For this reason——

X 21. I do not ask for the reason; he was not paid that $60,000?

A. He was not.

X 22. Now, you may state the reason.

A. Because the payment was to be made to the Bank of North America, and not to Mr. Mulvane, at the Parker house.

X 23. Any payment offered at the Bank of North America?

A. No, sir.

X 24. Why?

A. It was to be paid to Mr. Mulvane at that point, not to the bank.

X 25. Why was it not paid to him at that point?

A. Because Mr. Mulvane refused to complete the agreement that he had made on Saturday.

X 26. Did he state to you, at that time, that he did not believe you had any money?

A. He did not.

X 27. At either one of your interviews?

A. No, never. On the contrary, I showed him a letter from the cashier of the Casco bank——

X 28. I just ask you the question if he made that statement to you?

A. He did not.

188 X 29. Did he not make a statement to that effect?

A. To what effect?

X 30. That he believed you had no money?

A. He may possibly have said so after a while; I don't just remember that he did make it. After he left the room, after he had

called everything off, I don't just remember what he said; but during the negotiations——

X 31. I am talking of the time when he refused to sign this last paper.

A. I did not see that statement in the affidavit.

X 32. I merely ask you the question whether he made that statement to you?

A. He may have done so.

X 33. Now, I ask you if you stated in the affidavit that he did?

A. I have not got the affidavit before me. (Affidavit handed to witness.) Yes, it is here, that he said he was satisfied we could not raise the money.

X 34. You did, then, make that statement in your affidavit?

A. I did. That is correct.

X 35. Did Mr. Mulvane tell you when you began your negotiations with him how much of the stock he had with him here?

A. My impression was that he stated some sum. He stated that he did not have all the stock here with him.

X 36. Well, did he state how much he did have?

A. He stated that he owned all except $12,000; had it in his possession at home.

X 37. You say that the contract provided that that $50,000 was to be paid at the Bank of North America?

A. That is my understanding of it. At any rate, it was not to be paid until the other contract was signed.

X 38. And the other one was to be signed immediately?

A. Yes, sir. By the agreement, payment was to be made for and the delivery of said stock to be made at the National Bank of North America in Boston.

X 39. If you intended to pay the $60,000 in cash why did you make any inquiry as to his standing of Mr. Burr?

A. At his request.

X 40. For what purpose?

A. Well, he desired it. He said unless we had taken the trouble to look him up in Kansas, as we had not, he wanted us to make inquiry of Mr. Burr as to his ability and financial standing at home.

X 41. And you saw Mr. Burr?

A. I saw Mr. Burr.

X 42. Did you ask him if he would guarantee the carrying out of this contract?

189 A. No, sir. We told him the transaction we were going to make with Mr. Mulvane. He said that he knew that Mr. Mulvane was in town, but did not know his business. Then I asked him if in his judgment it would be safe for me to pay him $60,000 and let him make delivery of the stock at his pleasure. He thought it would not be a good thing for me to do. He did not think Mr. Mulvane would ask us to do it.

X 43. It was, then, on the strength of this, was it not, that you failed to offer Mr. Mulvane the $60,000?

A. No, sir; it was on his failure to sign the contract. If he had carried out the agreement, and if he had signed the contract, the

supplemental contract of Monday, the money that we required and the payment of the $60,000 would have been arranged all right.

X 44. Arranged how? Would you have paid him the $60,000 then?

A. We would have paid it into the bank.

X 45. "Into the bank." Would you have paid it to him?

A. Not without his putting some stock against it. We could not unless he put some stock against it.

X 46. But did he not state at the interview on the first day that the stock was at his home, all but $12,000?

A. Yes, sir.

X 47. Don't you know you would not have paid him $60,000 unless he put the stock against it?

A. I presume we should not, but the question was not put in that way. If there had been a disposition it could have been arranged undoubtedly.

X 48. I ask you now if, but for this interview with Mr. Burr, you would have paid $60,000 to Mr. Mulvane without his putting stock against it?

A. I think not.

X 49. And your supplemental or final contract which you desired to make was based upon that idea, was it not?

A. No; we *we* asked him to complete the transaction as he had agreed; to complete the sale by signing the supplemental contract.

X 50. But it was framed to remain in that way, was it not?

A. No, sir; it was framed according to the agreement made on Saturday.

X 51. Then this interview with Mr. Burr had no influence upon you?

A. No, sir; it was made entirely after the interviews with Mr. Mulvane.

X 52. Still, it had no influence upon your mind?

A. It may have had some influence—might have had in
190 the financial adjustment of the payments which were contemplated under this agreement of Saturday.

X 53. If Mr. Burr had said he would guarantee the carrying out of that contract you would have delivered Mr. Mulvane the $60,000, would you not?

A. Our proposition was to pay *pay* it to Mr. Burr; to make the payment to him as middleman, and Mr. Mulvane was to *to* put up stock against it.

X 54. That was the proposition that you made to Mr. Mulvane?

A. That was the proposition I made to Mr. Mulvane—that we would put up $60,000 and he should put stock up against it and draw the money.

X 55. Why, then, did you consult Mr. Burr?

A. Because he requested it.

X 56. He having requested it, why should you do it if you did not do it for the purpose of assuring yourself as to his solvency?

A. Well, the object of consulting Mr. Burr was to assure ourselves of his solvency.

X 57. You knew Mr. Burr was solvent?

A. We did.

X 58. If Mr. Burr had guaranteed that contract and the future delivery of the stock you would have paid the $60,000 on that day without stock being put up, would you not?

A. We offered to Mr. Mulvane to pay Mr. Burr the $60,000 and let him put up stock against it at his leisure.

X 59. If Mr. Burr had guaranteed that contract you would willingly have paid the $60,000 without delivery of the stock, would you not?

A. That is what we offered to do; we offered to put $60,000 into Mr. Burr's hands and let him deliver the stock afterwards.

X 60. I will put the question in another form and see if I can get an answer. If Mr. Burr had guaranteed the future delivery of the stock within the time mentioned upon the payment of $60,000 to Mr. Mulvane, you would have paid Mr. Mulvane the $60,000, would you not, on that guarantee?

A. I have no doubt we should.

X 61. But you would not after what Mr. Burr had said to you?

A. No.

X 62. Will you attach to your deposition, Mr. Wescott, a copy of this contract which you tendered to Mr. Mulvane?

A. That was only a rough draft, not a contract.

X 63. Well, the rough draft?

A. That was a rough draft, to be changed——

191 X 64. I asked you if you would attach a copy of it to your deposition. I was not discussing the terms of it. You did not produce a copy of it to Mr. Smith?

A. The copy that we have, Mr. Williams, I do not know to be a copy of what we presented to Mr. Mulvane; therefore, I could not attach what I do not know. He has the original copy.

X 65. You do not know that that is a true copy?

A. No; I don't know that it is. He went out and brought it in, made by a typewriter, which he says is a true copy; I don't know that it is.

X 66. Any reason to doubt it?

A. There were interlineations which I had made which did not appear in the typewriter copy.

X 67. It was not, then, a true copy?

A. It was not a true copy; no, sir. I had tried to perfect it so as to satisfy some objections which he had.

X 68. And you are very positive that the copy which was presented to you was not a true copy?

A. It was not in the interlineations. There was none on it then.

X 69. Did you state in your affidavit of the 28th of January, 1890, that it was a copy?

A. It purported to be a copy.

X 70. Will you answer the question, Mr. Wescott? Did you state in your affidavit of January 28, 1890, that it was a true copy of the contract? You can say yes or no. It is a very simple question. I

did not put in the word, "purported," at all. I asked you if you stated that it was a true copy of the contract?

A. (Reading from the affidavit referred to:) "At 12.30 p. m. Mr. Hanson and myself went to the Parker house and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson to look over, and asked him what changes he would suggest. The following is a copy of the contract." That is a copy of the agreement which was submitted to Mr. Mulvane for his signature as he returned it to us. I say here in the same part of my affidavit: "We called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it. We assured him that we had no copy and that it was only a rough draft, on which we had asked him to make such changes as would meet his views, but on which he had declined to make any suggestions or enter into any conference whatever in relation to the matter. He, being pressed for the paper, agreed to have a copy made and return the paper at once.

192 At half past six he returned the typewriter's copy to us, saying that he should keep the original and that all negotiations were off, so far as he was concerned." That is a copy of what he returned to us.

X 71 Q. I dislike to have to repeat my question, Mr. Wescott, and I think by this time you might give a direct answer. Did you in your affidavit on the 28th of January, 1890, say that the document you set out was a copy of the contract?

A. I did.

X 72. Will you please annex to your deposition as Exhibit D a copy of the contract as set forth by you in your affidavit of that date?

(Copy produced and marked "Exhibit D.")

X 73. After the execution of the instrument which was signed by all of you on December 14, did you have any discussion with your coplaintiff or your associates in the enterprise with reference to the payment of $60,000 in money to Mr. Mulvane at that time and before the delivery of the stock?

A. We had a conference on Monday, immediately on my arrival in town; I have before stated that.

X 74. I am talking about a conference with your associates?

A. Yes; with my associates, with reference to this particular money.

X 75. State all of that conference?

A. The conference was, that we had made an agreement with Mr. Mulvane to pay him $60,000, and that he wanted a check on New York or a draft on New York.

X 76. Did he state, by the way, that he wanted it then; had some use for it in New York?

A. He did not state that; I assumed that he did, because it went without saying, and as soon as we had completed the supplemental contract we could go to the bank for the money and pay it over to

him. Mr. Potter said the money was there and directed his cashier to pay me the money and take my receipt for it.

X 77. Was that all that was said at that conference?

A. At the bank?

X 78. Yes, sir.

A. Yes, sir.

X 79. Then, that is not responsive to my question. I asked you if there was any discussion as to the advisability of paying him this money; any discussion as to his solvency?

A. I asked Mr. Hanson if he had seen Mr. Burr with regard to the solvency of Mr. Mulvane, as to the propriety of paying him $60,000 on his signature, and he said no. Then I said: "I will at once go and see Mr. Burr and see what he says in regard to Mr. Mul-
193 vane." I went over to the Bank of North America and had a conversation with Mr. Burr.

X 80. And thereupon declined to pay the $60,000 in money against his receipt?

A. I declined to pay him $60,000.

X 81. I say, to him?

A. Yes, to him.

X 82. You said in your direct examination, Mr. Wescott, that the stock of the water works Co. was transferred to other parties after you brought your suit; did you make that statement on your personal knowledge?

A. No, sir; I did not; I so understood it.

X 83. You do not personally know?

A. I do not know anything about what occurred at Topeka.

X 84. Up to the time that the agreement Exhibit — was made, being the one which you all signed, had you disclosed to Mr. Mulvane the fact that any one was associated with you in this enterprise except your coplaintiff?

A. Yes, sir; we went over all that matter in Topeka, showing Mr. Mulvane what we had done in Springfield, Mo., by the actual purchase of that plant, and that it was in practical operation, and also that we were in negotiation for other plants and had a syndicate of gentlemen who were connected with us, of which we were two of the principals. I gave him the address of the Casco bank, Portland, Maine, as to my ability to carry out any agreement into which I entered.

X 85. I am not asking you about that, but as to anything you said to him in regard to your associates in this enterprise.

A. Yes, sir.

X 86. Did you name any of them?

A. I think not.

X 87. What is the nature of that syndicate, Mr. Wescott?

A. The nature of that syndicate?

X 88. Is it a corporation or a private concern?

A. A private concern.

X 89. Is it in the nature of a partnership?

A. No, sir, associates. For instance, a few gentlemen come together and say, "We will purchase"—gentlemen say to me, "Mr. Wescott, if

you will negotiate for water works and operate them, on the condition that you will buy them and operate them, we will go in with you to furnish our portion of the money with you to purchase any plants that you will recommend." On that understanding I went ahead and purchased, as we supposed, the Springfield and also the Topeka.

X 90. Each member of that syndicate had an interest proportioned to the amount he put in?

194 A. He did; the bank, however, agreeing to furnish the money.

X 91. I do not care about the details; there was, you say, no written agreement?

A. No written agreement.

X 92. No arrangement as to liability?

A. No arrangement as to liability except each man was liable for his interest which he had in it.

X 93. Be kind enough to state the names and residences of the gentlemen interested in this particular enterprise, to wit, the Topeka.

A. In this particular one there was Mr. Asa P. Potter and myself, George P. Wescott, and Samuel Hanson.

X 94. Mr. Potter and Mr. Hanson, I believe, are citizens of Massachusetts and you of Maine?

A. Yes sir.

X 95. What was the amount of interest of Mr. Hanson?

A. Mr. Hanson's interest would be 15 per cent.

X 96. Yours.

A. 25.

X 97. And the balance?

A. 60.

X 98. Mr. Potter's?

A. Yes.

X 99. Mr. Wescott, when you met Mr. Mulvane for the purpose of having him sign the final contract, I want you to state fully what discussion took place as to the payment of $60,000 then.

A. Mr. Mulvane had already declined to sign the contract which Mr. Hanson had previously asked Mr. Mulvane to sign, and after I came in the talk was desultory throughout; for a long time we tried to find his objections, why he was not willing to make out a supplemental agreement—he having made his agreement of Saturday, why he should not complete the supplemental agreement on Monday at once. At no time did Mr. Mulvane ask for $60,000 on Monday.

X 100. Do you mean to say you did not discuss the question of the payment of that $60,000 with him at that time?

A. It was alluded to in room 63 only, as my recollection is, and grew out of conversation like this. I said, "Well, Mr. Mulvane, you declined to make this agreement with Mr. Hanson this morning and you declined to discuss with me its provisions and correct it so that it would be satisfactory; now what am I to understand?" Well, he said it didn't suit him. Then he inquired if I had seen Mr. Burr; I told him I had. I had just come from there, and he wanted to know if we were ready to make the payment of the $60,000. I told him

we were ready to pay it; he could have a New York check at
195 any moment the agreement was completed, when the agreement was ready. "Now, then," I said, "in the line of what Mr. Burr has said, don't you think it would be fair for you to put up the stock before we make the payment?" That he said he couldn't do because the stock was in Kansas.

X 101. You knew that fact, didn't you?

A. I did; that is, this was a transaction that was not completed in twenty minutes; it was not to be completed until Monday, but he said that he could put it up in three days' time.

X 102. Did you not decline to pay him any money unless he did put the stock up?

A. No, sir, I did not; I had no opportunity for declining.

X 103. You say that if he had signed the agreement you would have paid him the $60,000?

A. If he had completed the agreement.

X 104. If he had signed the agreement?

A. If he had signed the agreement I would have done it. That is provided for in the Saturday's contract, and if he had demanded his money he would have got it right then and there.

X 105. Just on the signing?

A. Just on the signing; he was entitled to it on the Saturday contract.

X 106. Without a deposit of the stock?

A. Without a deposit of the stock.

X 107. I believe you have stated that you informed Mr. Mulvane that the draft of this agreement had been submitted to him by Mr. Hanson before you met him?

A. Yes, sir.

X 108. In your affidavit of January 28, 1890, did you use this language: "Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor, and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay Mr. Mulvane to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane. In reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party, and he had the fullest confidence in his integrity. I then stated to him that I was to pay Mr. Mulvane $60,000 and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended. His
reply was prompt and to the point that he would not guaran-
196 tee the life of any man, which was in effect what I was asking him to do. Further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself. He did not believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out. I returned to the Maverick bank at once and

stated what Mr. Burr had said both to Mr. Hanson and to the president of the bank, Mr. Asa Potter. Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself and stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when he would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make."

X 109. Did you make such a statement in your affidavit?

A. Yes, sir; I want to say that that is——

X 110. You will have plenty of opportunities to make explanations; I do not want to incumber the record. I would like to ask you once more if there was any reason why you made inquiry of Mr. Burr as to the solvency of Mr. Mulvane except the one you have already given, to wit, that Mr. Mulvane requested it?

A. Yes, we also desired for our own information to know his standing; we had seen his rating in the commercial agencies and had seen it in Topeka, and his showing was good. Now, what Mr. Burr might say would reinforce our minds in regard to Mr. Mulvane.

X 111. If stock was to be put against payments what figure did his solvency cut?

A. Well, that was not the fact; up to the time when we made this agreement with Mr. Mulvane and up to Saturday night, when we supposed we had completed the agreement, we had expected and proposed when the agreement was signed to pay him $60 000 in cash if no better arrangement could be made, on his demand, without any condition, and then to take the chance.

X 112. And to see if that was safe you consulted Mr. Burr?

A. No, then we consulted Mr. Burr with regard to Mr. Mulvane, and we tried during Monday to see if Mr. Mulvane would put up the stock.

X 113. Which you knew he could not put up?

A. He could put it up in three days.

X 114. He could not put it up that day if he had signed the contract that day, could he?

A. Well, he could not have got the money anyway by signing the contract up to the time——

X 115. Could he have put up the stock the day you wanted him to sign the contract?

197 A. Oh, no; but had he not declined and demanded his money——

X 116. I am not asking what your mental reservations might have been, but what took place. You did not consult Mr. Burr, then, for the purpose of seeing that it was safe to make that payment?

A. Not until after I had understood he had declined to discuss the agreement which Mr. Hanson had prepared.

X 117. Then this consultation with Mr. Burr was after, and not before, he declined to sign this agreement?

A. After I understood from Mr. Hanson that he declined to sign.

X 118. Was it after you had the discussion with him?

A. Oh, no, sir; before I had seen him.

X 119. It is not my business to afford you an opportunity to mak an explanation, but I will right here. Do you recollect what yo just read from your affidavit?

A. Yes, sir.

X 120. I want to call your attention once more to a paragraph "Mr. Hanson showed me a memorandum of agreement which h had prepared for the signature of Mr. Mulvane and myself, but state that he had not submitted it to Mr. Mulvane, and was waiting fo me to go with him and meet Mulvane." Is that statement true o false?

A. Well, in view of Mr. Hanson's statements here I want to sa this: That I went home from here on the 16th and on the 17th wrote, to the best of my recollection, this affidavit which is signe by Mr. Hanson and myself. Mr. Hanson has already corrected m in several particulars——

X 121. I am not asking about Mr. Hanson's position, but you own. Is the statement there true or false? Did Mr. Hanson mak that statement to you or did he not?

A. At that time, when that was written, that was as I under stood it.

X 122. Now, did you state that Mr. Hanson had not seen Mr. Burr president of the Bank of North America, to ascertain if Mr. Mulvan was responsible and if they (meaning the Bank of North America would guarantee a payment of the nature proposed to be made t Mr. Mulvane on the signing of the contract?

A. Well, on Saturday——

X 123. Did you make that statement?

A. I made that statement. On Saturday——

X 124. Now, if you will just contain yourself and content yourse with answering my questions; I want to get at your statement an then you can make all the explanations you want. Did yo
198 in your interview with Mr. Burr state to him that you wer to pay Mr. Mulvane $60,000 and then ask Mr. Burr if h would be responsible for the honest and safe delivery to us (meanin you and Mr. Hanson) of the stock of the water company, provided w (meaning you two plaintiffs) made payment to Mr. Mulvane?

A. Yes, sir.

X 125. You have said that Mr. Mulvane sulked and refused t discuss the final contract you submitted to him. Did you state i your affidavit that he did discuss the date at which you desired t take possession of the water works?

A. Yes, sir.

X 126. There was, then, some debate on that contract?

A. Yes, sir.

X 127. He did not sulk on that point?

A. Not on that point.

X 128. How long were you in that room?

A. We were there from 12:30—in the two rooms—until about si o'clock.

X 129. By the way, do you recollect any absolute twenty minute interval in which not a word was said?

A. I think at one time Mr. Mulvane stood in the bay window of No. 304—I don't know; it was a long time; it was more than ten minutes.

X 130. There were several of those eloquent fits of silence, were there not?

A. He simply stepped to the bay window, out of sight behind the curtains, and done it repeatedly, ten minutes at a time.

X 131. Ten minutes at a time, several of those intervals?

A. Yes, sir.

X 132. None of you saying anything?

A. None of us saying anything.

X 133. After he made the objection to the date of the delivery did you suggest taking possession after delivery of all the stock?

A. Yes, sir.

X 134. Did he object to that?

A. He made no reply whatever.

X 135. Gave no sign?

A. No; no sign whatever.

X 136. Didn't show what he thought about it?

A. Didn't say what he thought about it at all.

X 137. Did you state to Mr. Mulvane that you desired to know before meeting him that day whether Mr. Burr would guarantee the delivery of this stock?

A. I think not.

X 138. Did you state to him that you desired to see Mr.
199 Burr, before meeting him, Mulvane, for the purpose of asking Mr. Burr if he would guarantee the performance of the contract?

A. No, sir.

X 139. Did you in your affidavit make this statement, referring to a conversation with Mr. Mulvane at this final conference: "In conversation we told him that we had had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock and we wished to know before meeting him whether Mr. Burr would guarantee a performance of the agreement, which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do." Did you or did you not make that statement in your affidavit?

A. I did; yes.

X 140. Now you say that you did not say to Mr. Mulvane that you desired to see Mr. Burr before you saw him, Mr. Mulvane, to ask him if he would guarantee a performance of this contract?

A. We saw him after Mr. Mulvane's request that we should do so; it came from Mr. Mulvane that we should see him.

X 141. I have understood that a great many times, but you did not say that to Mr. Mulvane.

A. No, sir; that is, I did not say it on Saturday; it was said to him on Monday.

X 142. I ask you on Monday?

A. On Monday, yes; I did not understand your question, Mr. Williams, just; I want to place myself right on this; I stated this to

Mr. Mulvane on Monday; now, I understood your question was that it was a condition of the agreement of Saturday that I should do it.

(Interrogatory 140 read.)

A. In fairness, Mr. Williams, I am not trying to evade anything if I know what is right; I did state that to Mr. Mulvane on Monday; now, I would like to have the previous question read.

(Interrogatory 139 read.)

A. That is just as I understand it.

X 143. During this interview in regard to the final contract submitted I believe you said Mr. Mulvane sulked and very little was said?

A. Yes, sir.

X 144. And that he did not give any reasons for not signing the contract at that time?

A. Yes, sir.

X 145. Did you state to Mr. Mulvane—now, this was at the time when you were at this final contract, not Saturday, but Mon-
200 day—did you state to him that Mr. Burr had given him a high recommendation for integrity and financial ability, but was not willing to guarantee the safe delivery of the stock?

A. Yes, sir.

X 146. And did you also say to him that he, Mr. Mulvane, should not ask you to pay this money until the stock had been put up against the money in the hands of some bank or a responsible person?

A. That I stated to him was the statement of Mr. Burr.

X 147. You did not state it yourself, then?

A. Not as my statement, but as the statement of Mr. Burr.

X 148. Did Mr. Mulvane then say to you, "I understand you will not put up the money unless I put up the stock, and this means more delay"?

A. No, sir; he did not state it in that way; that is, he said this: "It is impossible for me to put up this stock without three days' additional delay," and he says—well, I will say he did; it amounts to that.

X 149. And he also said that he understood you would not put up the money unless the stock was put up?

A. We asked him why he objected to putting up the stock, and he said it meant additional delay.

X 150. Well, did he say to you: "I understand you will not put up the money unless I put up the stock"?

A. I don't remember that that was said in that way.

X 151. Still, you had some conversation on that subject then?

A. We asked him what objection he had to putting up the stock, and he said it was the additional delay; the money was never refused Mr. Mulvane.

X 152. My question was if he said to you: "I understand you will not put up the money unless I put up the stock, and this means more delay"?

A. That may have been said, but I did not refuse to put it up.

X 153. You did not refuse to put it up?

A. Because no absolute demand was made.

X 154. You say you did not refuse to put it up?

A. No.

X 155. Did you say, either you or Mr. Hanson, or both of you, at that time, that inasmuch as Mr. Burr would not guarantee the carrying out of this contract, you must insist on some security?

A. Yes, sir; we said that.

X 156. Did Mr. Mulvane then say to you that that was an evasion of the contract?

201 A. No, sir.

X 157. Did he take the ground at that time that was an evasion of the contract?

A. No, sir.

X 158. This was Monday I am talking about.

A. Monday, yes.

X 159. In your affidavit of January 28th, 1890, being the affidavit used by your counsel on the preliminary hearings in this case, did you use this language: "I informed him (Mulvane) that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and didn't think that Mr. Mulvane should ask us to do so until the stock had been put up against the money in the hands of some bank or responsible person. Then he, Mulvane, said: 'I understand you will not put up the money unless I put up the stock, and this means more delay.' We replied that as Mr. Burr would not guarantee his doing so we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible."

A. Yes, sir; that is in the affidavit.

X 160. Did he state at that time that he thought the recommendation Mr. Burr had given him was ample and all that had been contemplated and expected by him at the time of your interview on Saturday, and that he expected you would pay him the money on the recommendation given by Mr. Burr?

A. Yes, sir.

X 161. And did you decline to do it, either you or Mr. Hanson?

A. No, sir.

X 162. Did you state to him that he should not ask you to do what he would not do himself?

A. No, sir; that was Mr. Burr's statement.

X 163. In your presence?

A. Mr. Burr stated it to me and I stated it to Mr. Mulvane; it was not my language.

X 164. It was you that made the statement to Mr. Mulvane on the strength of what Mr. Burr had said?

A. Yes, sir; it was not my language.

X 165. I will ask you if Mr. Hanson did not say at this interview that Mr. Mulvane ought not to ask you to do what he would not do himself.

A. I don't remember, sir, that he did.

X 166. Did Mr. Mulvane say to you that afternoon, either at the first interview or the last one, about half past five, that he was satisfied that you could not raise the money?

202 A. That was Monday afternoon.

X 167. Yes, I am talking all the time about Monday afternoon.

A. Yes, sir.

X 168. And that he declared the whole thing off?

A. Not at that time; this statement was made about two o'clock in the afternoon and he declared the whole thing off about six.

X 169. Well, that was the time he said he believed you could not raise the money, was it not?

A. No, sir; he said that about two o'clock in the afternoon, and it was six o'clock before he said that the whole thing was off.

X 170. It was two o'clock when he said he didn't think you could raise the money and about six when he declared the whole thing off?

A. Yes, sir.

X 171. I will ask you if you stated in your affidavit the following: "Mr. Mulvane left the room, and when he came back, about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off." Did you make that statement?

A. Yes, sir, I did make that statement; I was mistaken before; it was not in 63, it was in 304.

X 172. Then it was made?

A. It was; yes, sir.

X 173. You stated that you prepared a statement in this case immediately, and submitted it to counsel. How soon after your final interview with Mr. Mulvane did you prepare that statement for your counsel?

A. I prepared it on the next day; on the 17th of December the statement was prepared.

X 174. And submitted it to him when?

A. The latter part of December; I brought the statement the next time I came to Boston and showed it to Mr. Hanson, and told him what I proposed to do.

X 175. I just want dates now, that is all.

A. The latter part of December.

X 176. When did you submit the matter to Rossington, Smith & Dallas?

A. I could not tell you, sir, the date.

X 177. The bill was filed on the 5th of February; now, about what time did you submit the matter to them?

A. I don't remember, sir; it was some time in January.

X 178. I am talking about Rossington, Smith & Dallas.

A. I don't remember, sir; it was some time in January; it went from here by express with all the data; it was sent by Wells & Fargo express from here the latter part of January.

203 (It was agreed by counsel that the bill was filed immediately after receiving the papers.)

X 179. Where was this bill which was filed prepared, Mr. Wescott? Here or in Topeka?

A. In Topeka, I presume; I had nothing to do with it.

X 180. You did not send any prepared bill out there?

A. No, just sent the affidavits—statements.

GEO. P. WESCOTT.

Redirect examination.

By Mr. SMITH:

Int. 74. You have referred, in your cross-examination, Mr. Wescott, to a supplemental agreement or contract; is that the agreement which is referred to in the contract for sale, that was signed on the Saturday previous?

A. Yes, sir.

75. Now, will you explain what the understanding of the parties was as to this supplemental contract or agreement? Was there any change in it except as to the amount of consideration mentioned in it?

A. No, sir; not that I know of.

76. Then the agreement you refer to is the final agreement, or supplemental agreement, according to your view, referred to in the contract where it says: "The sum of $60,000 to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be $440,000"?

A. Yes, sir.

77. Did Mr. Mulvane at that time state any reason why he wanted this new consideration put in this contract to be signed when the money was to be paid?

A. He did; we understood when we closed the contract Saturday evening, and thought we had closed a final contract which was to perform the agreement, that that was a private contract with Mr. Mulvane and of such a nature that he did not wish to show to any stockholders or associates who might ask to see it; therefore, in order to meet Mr. Mulvane's views, we consented to change the consideration in the contract to be signed. He insisted on putting in a clause that we should sign a supplemental contract with a change of the consideration to $440,000.

78. Did Mr. Mulvane make a demand upon you at any time during Monday for the payment of $60,000, or did you at any time on Monday refuse to make a payment of $60,000 to him?

A. No, sir; he did not demand it, nor did we refuse to pay it.

204 79. If he had signed a contract wherein the consideration was expressed at $40,000, and demanded as a matter of right that you immediately pay him after the signing of that contract the sum of $60,000, would you have paid it to him on Monday?

A. I should.

80. Did he at any time during the interview on Monday make any suggestion with reference to the drawing of a contract of the kind mentioned in the articles that were signed on the 14th?

A. I think not.

81. Can you state from what occurred at the various intervie on Monday whether Mr. Mulvane came there for the purpose of g ting $60,000 and executing the contract, or for the purpose of n getting any money and evading the contract previously made?

A. My understanding of the Monday's conversation and of M Mulvane's conduct on Monday was that his whole efforts on Mond was how not to get $60,000 rather than how to get it.

82. What was your financial condition at this time, Mr. Wescot How much were you worth?

A. I was worth on Saturday, the 14th day of December, 1889, mo than $250,000 above all liabilities of every nature whatever.

83. If it had become necessary for you personally to procure $60,0 on that day could you have done so?

A. I could have done so. I had more than $200,000 of collater that I could put my hand on, and I could have raised the mon here in Boston or in Portland at a day's notice myself.

84. You were about to explain a discrepancy between a statem contained in your deposition as taken here and a statement contain in your affidavit that you made at the time this bill was original filed when you were stopped by the counsel who was cross-exam ing you; if you desire to make any explanation of that kind y may now do so.

A. The conversation which I had with Mr. Burr resulted so d ferently from what I had anticipated, from the fact that Mr. Bu knew nothing whatever of Mr. Mulvane's intentions here, and fr the fact that it developed that he was a stockholder in the prope and was desirous of saying nothing about Mr. Mulvane because his personal relations, it placed rather a new phase on the negot tions, and when I returned from the bank I was somewhat in has because we were behind time, and my recollection of what Mr. Ha son told me was as stated in the affidavit which I signed and whi he signed. Afterwards, after the papers had gone forward, in ta ing the thing over I became satisfied that the statement here shou have been modified.

205 85. Statement where?

A. In my affidavit, which is as follows: "Mr. Hans showed me a memorandum of agreement which he had prepar for the signature of Mr. Mulvane and myself, but stated that he h not submitted it to Mr. Mulvane, and was waiting for me to go w him and meet Mulvane."

86. How do you want that statement to stand?

A. I desire to say that Mr. Hanson had seen Mr. Mulvane, as afterwards informed me, and with this agreement, before I h seen him.

87. With whom did you take counsel as to your rights under t contract as signed?

A. Symonds & Libby.

88. Who are Symonds & Libby?

A. They are attorneys in the city of Portland; Mr. Symonds

ex-judge of the supreme court, and Mr. Libby has been county attorney for Cumberland county.

89. I wish you would examine this letter, purporting to be signed by Mr. Symonds.

A. Yes, sir; I have read it over.

90. When did you first consult Mr. Symonds?

A. The latter part of December; I think it was a little before Christmas.

91. And he gave you counsel upon your rights?

A. He did.

92. What occasioned any delay in your acting upon his counsel?

A. There were two things; the death of my sister, which occurred on the first day of January, and the illness of myself from the grip, with which I was taken in Judge Symonds' office while I was in consultation on this same matter; I was laid up in the house for some four weeks by reason of it—during the whole month of January.

93. Were you advised of the sending of a letter by Mr. Symonds to Mr. Mulvane?

A. I was.

94. Do you know as a matter of fact to whom that letter was sent, and how it was sent?

A. I do.

95. How was it?

A. It was addressed to Mr. Mulvane at his office in Topeka.

96. Was that written by you or Mr. Symonds?

A. Written by Judge Symonds.

97. Did you ever receive any letter from Mr. Mulvane after his leaving Boston?

A. No, sir; I did not.

GEO. P. WESCOTT.

206 SAMUEL HANSON, a witness on behalf of the complainants, being duly sworn, testified as follows in answer — interrogatories propounded by Mr. Smith, of counsel for complainants.

Int. 1. What is your name, age, place of residence and occupation?

A. Samuel Hanson, connected with the bond department of the Maverick bank.

2. Are you one of the complainants in this suit?

A. I am.

3. When was your attention first attracted towards the Topeka Water Supply Co. property?

A. Well, I had known something about it for a year prior to the time of my first visit.

4. When was that?

A. My first visit was about the first of October, 1889.

5. Have you ever made a personal inspection of the property?

A. Yes.

6. When and under what circumstances?

A. The first time that I inspected the property was, as I say, about

the first of October, 1889; I started West with Mr. Wescott for the purpose of inspecting the works in several cities, amongst them Topeka; after going to other places I left Mr. Wescott and alone went to Topeka; I went all over the city; I inspected the plant of the company, and I finally went into the office of the company and introduced myself and met a gentleman whom I learned was, I think, Dr. O'Brien, the secretary or treasurer of the company, and I asked him if the works were for sale; he said that he himself was in favor of selling them; he thought it was doubtful whether the president of the company would sell, but referred me to him, Mr. Joab Mulvane; I called upon Mr. Mulvane, and had quite a long conversation with him; he talked about what I had seen and the value of the property; and seemed quite willing to give me what information I required in addition to that I had already gained, so that by the time our conversation had continued some little time I felt pretty well posted in my own mind as to the value of the property; I then asked Mr. Mulvane if he wished to sell; he told me that he would; I asked him what he would sell for; then we had a discussion in regard to the value of the property; the result of it was that he told me that he would not say absolutely on that day that he would sell at such a price, but if I was disposed to offer him $500,000 he thought it would be accepted; I told him that I was not then and there in a position to make him an offer; that Mr. Wescott, who had been with me and had left me, much to my regret,
I could not reach because he had returned to the East,
207 but I thought I could get Mr. Wescott to come out and make
an examination of the property; I reported to Mr. Wescott and also to Mr. Potter the result of my visit in Topeka, I think quite in detail; I told them I had seen Mr. Mulvane about it; it was some little time after I left Topeka before I returned to Boston; I went as far West as Denver; but on my return to Boston, on further consultation with Mr. Potter and Mr. Wescott, it seemed that if Mr. Wescott's examination of the property should corroborate what I said and his views should be the same as those I had expressed, the purchase would be a very desirable one; Mr. Wescott and myself, therefore, started West; we went to Topeka and had an interview with Mr. Mulvane; we found him in quite the same frame of mind that he was when I saw him, quite ready to let us make an examination of the property; we wished to go and see the books of the company; Mr. Mulvane said that we certainly could do so, but he did not wish us to let Dr. O'Brien know that he proposed to sell the property; that there had been some talk about issuing bonds, and when we went there, if the matter was spoken of, we were to appear to be there for the purpose of purchasing the bonds; Mr. Wescott and I then made an examination of the books of the company; we found things substantially as we had expected; we examined the plant, and were driven about the city by Mr. Shaw; Mr. Shaw was mentioned to us by Mr. Mulvane as a man who was in the employ of the company, and who would be, in his judgment, the most capable man we could find as superintendent in case we purchased the works; we then had conversation with Mr. Mulvane in regard

to the price at which he would sell; we offered first $400,000, then $450,000, and we kept on; still he would not change his mind, and finally it was agreed that we would pay, substantially as Mr. Wescott has stated, $500,000; we then had an interview in the back office of the bank, as Mr. Wescott has stated it, and considered that the matter was closed; we returned East; the next we heard from Mr. Mulvane was the correspondence which Mr. Wescott has referred to today, and in due course of time Mr. Mulvane came to Boston; we met him at the Parker house and we expected to take the matter up exactly where it had been left and complete the matter, but he stated that he could not sell us the property then for $500,000; that he must have more money; that he had, in the meantime, succeeded in obtaining all of the stock excepting $12,000, but that every share that he had obtained cost him more than par, and that he must have more money from us. We demurred. We understood that the agreement was made out there; we thought the understanding
208 was complete; we had reported to our friends that the price was $500,000, and we demurred. The conversation lasted until late into the afternoon.

7. This was on Saturday?

A. This was on Saturday; and Mr. Wescott and I, upon consultation, decided that we had been to Topeka; we had examined the works; we had had a perfect understanding in the matter; we had come to his terms, which was perfectly and thoroughly understood, and that it was only fair and right that the matter should be continued in exactly the same line in which it had been all the time, and we so told Mr. Mulvane; that we considered that we had bought the works; that he was merely coming here to complete the transaction, and that was as far as we could say. We put on our coats and were going out of the door, and Mr. Mulvane says: "Well, how does this leave the matter?" I replied that of course the matter was not closed on that day, it was left open. He said, "Very well, come back." We came back and wrote the agreement which has been referred to here today.

8. Who drew the agreement?

A. Mr. Wescott. The agreement was drawn by Mr. Wescott; I drew a copy of it, it was duly signed, and when Mr. Mulvane affixed his signature, he said: "There, now you have my signature, which you did not have before." We certainly considered that the whole affair was terminated and ended there. In the agreement that was made and signed, reference was made to a collateral agreement which should be made on the following Monday. When Monday morning came I sat down to draw that agreement, and for the life of me I could not tell what I could say different from what we had said. It seemed to me that everything was done; I did not know what sort of an agreement to draw up unless I drew a fac-simile of what we had signed. So I went up to the Parker house and I found Mr. Mulvane in the writing-room writing, and said: "Mr. Mulvane, when I came to look over the document we had signed, for the life of me, I don't know what we have got to say; everything is there, as far as I can see; but if you want anything different, suppose you

draw the agreement." "No," he says, "you do that." I said, "I really don't know what to do" He says, "You do that." So I came back to the bank and I drew the paper.

9. What time in the day was this?

A. This may have been half past ten or eleven o'clock in the morning. That draft I took up to Mr. Mulvane to see if it met with his approval. He looked at it, and he says, "That is not right." I said, "What is there that you wish changed?"

10. Was Mr. Wescott with you at this time?

209 A. Mr. Wescott had not arrived then. Mr. Wescott was on his way from Portland; I said, "What do you want, Mr. Mulvane?" "Well," he said, "that is not right." "Well," I said, "won't you draw it and put it in whatever way you want it?" "No." "Well," I said, "won't you come down to the bank and see Mr. Potter? I am sure that you and he together will have no difficulty in arranging this matter." No, he wouldn't. "Well," I said, "I should personally like to have you see Mr. Potter very much indeed." Well, he didn't know; it was a good ways to go. I said, "I will get a carriage and take you down." No, he wouldn't go. I went back to the bank and reported that interview to Mr. Potter; Mr. Wescott arrived and we came up to meet Mr. Mulvane; we had a draft of this agreement and we submitted it. It did not meet with Mr. Mulvane's approval; we had some conversation backwards and forwards and suggestions were made; Mr. Wescott made changes in that agreement; I think there were changes made several times; and we constantly asserted that it was our desire to do almost anything he wanted; that the main points were entirely covered and that matters of detail were of no consequence to us. Finally Mr. Mulvane said that he disavowed the whole thing, the whole thing was off, and rose to leave the room; I would say, however, that we probably remained in the room an hour and a half and I have not the slightest question that several lapses would be as long as twenty minutes without a word being said; he finally left the room, taking this contract with him; we called him back and asked him if he would not give us the draft of the contract. He declined to do so, but finally, upon our insisting, he said he would give us a copy; he went off and we met him downstairs afterwards and he handed us a typewritten document which he said was a copy.

11. Have you ever seen that draft of the contract referred to since the time you gave it to Mr. Mulvane?

A. The one which was drawn by myself originally?

12. Yes, sir.

A. I have never seen it.

13. Well, what else occurred at this interview on Monday between you and Mr. Mulvane and Mr. Wescott?

A. Well, I remember one remark that Mr. Mulvane made. He said that he had been trying to look me up in the directory; that about Mr. Wescott he knew; that he knew of him through various friends and he knew all about him and his responsibility, but he had been looking in the directory and he could not find me. He found that there was a Mr. Hanson connected with the Boston — Albany railroad

and wanted to know if I was the man; I told him no, that I was connected with the Maverick bank; that I was
210 the bond department there and I would refer him to the Maverick bank as to my ability to carry out the contract.

14. What did he say to that proposition on your part?

A. I don't remember that anything special was said.

15. Had you the $60,000 provided for in the contract signed by yourself, Mr. Wescott and Mr. Mulvane, under your control so that it could have been turned over to him at the time?

A. Certainly. Directly that the contract was signed, the following Monday morning, I reported the matter and arranged with Mr. Potter and Mr. Work, the cashier of the bank, for the money.

16. Were you expecting to use that $60,000 that day for that purpose?

A. I was; I supposed, of course, it would be paid.

17. Had you made any arrangement with Mr. Work, the cashier, to remain at the bank until after banking hours for the purpose of turning over the check?

A. I personally had not, but I understand it was done.

18. Do you know of such an arrangement being made?

A. I understand the president requested him to remain.

19. Do you know whether he remained there or not?

A. I have always understood that he did, but of my own knowledge I do not.

20. What reason, if any, did Mr. Mulvane give for his conduct on Monday?

A. I could not tell you what reason he did give; Mr. Wescott and I talked the matter over and we said that we could not see what Mr. Mulvane wanted; we failed to see what the matter was.

21. Did he make any demands upon you that you failed to comply with at that time?

A. None that I remember now.

22. Did he offer any suggestions about changing the form of the contract, or the terms, or the phraseology?

A. Nothing except that which we were instantly ready to agree in as far as we could in keeping with the contract which was already made.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. What amount of money was to be paid in cash, according to your preliminary talk in Topeka?

A. You mean when Mr. Wescott and I met Mr. Mulvane there?

X 2. Yes, sir.

A. I don't know that I recall.

X 3. Was it not $50,000?

211 A. Yes, there was talk about that, but I don't remember that that was in Topeka.

X 4. Well, wherever it was, that was the amount?

A. Yes, $50,000 was the original amount.

X 5. When you met in the Parker house, as has been testified here, Mr. Mulvane demanded $550,000, and you refused that demand; then he demanded $525,000 and you refused that. Now, was any alteration suggested by Mr. Mulvane as to the amount of the cash payment?

A. There was; it became $60,000.

X 6. I wish you would state what he said about that.

A. I don't recollect anything specially said about that, any more than there was a general discussion as to how all the money should be paid and in arranging the terms of payment, which was stated in the contract at various times, that amount was mentioned, as others were.

X 7. Did he say anything about needing the money at that time?

A. I don't recollect that he stated that he needed any money particularly.

X 8. Did he state that he could make good use of that sum at that time?

A. I think he may possibly have said something of that kind; I think he gave that as one of the reasons for selling the property.

X 9. That he could make good use of $60,000 at that time?

A. Yes, and of the entire amount which we were to pay him.

X 10. I am speaking of the payment now of $60,000 in cash. Did you have $60,000 of your own money, Mr. Hanson, at that time?

A. I did not.

X 11. Were you in a situation to procure for your own use that sum of money?

A. I was in a position to procure for the use for which I had promised $60,000.

X 12. I understand that; I am getting at your financial standing. Could you at that time have procured for your own use $60,000?

A. I cannot say what I might have done.

X 13. What was your financial standing at that time?

A. I was enabled to procure $60,000 in that instance. I cannot say that I could not have procured it in another. Do you mean to ask whether I was worth $60,000.

X 14. I mean to ask, if you will permit me to finish my question, what I have not asked yet: Were you in such a financial condition at that time that you could for your own use, according to the general course of banking business in the city of Boston, procure the sum of $60,000?

212 A. I do not wish to answer that question in the negative, although I might do so under certain circumstances, because, having been in a position where I had command of $60,000 for this purpose, I might have done it in others.

X 15. You are taking a good deal of time unnecessarily. You are in the banking business, I think you said?

A. Yes.

X 16. You know, therefore, the rules that govern banks in making loans?

A. If you wish to know whether I had $60,000 in collaterals I will answer that.

X 17. I will get at my question in my own way. You said you were in the banking business?

A. I said I was manager of the bond department of the Maverick bank.

X 18. That is in the banking business. You are aware of the fact that in making advances to people sentiment does not enter into the matter, but a man's solvency is the only question considered. If you had desired for the purpose of an investment of your own in the West to raise $60,000, were you in such financial condition at the time of this transaction that you could have procured a loan of that amount on the strength of your financial standing?

A. I think that if I had received the property to which I was entitled by the payment of $60,000, I was in a condition in which I could have raised the money.

X 19. I will repeat the question and ask the master to strike the testimony out if I do not get an answer, if I succeed in making it plain. Was your financial standing such at the date of this transaction that you could in the ordinary course of business have borrowed for your own exclusive use the sum of $60,000?

The MASTER: You can answer that irrespective of this transaction and then if you answer "no," you can have an opportunity afterwards to explain that in this particular transaction you could. If you answer "yes," that settles it.

A. My reason for not giving a decided yes or no to the question is this, that a person in making a loan of $60,000 would naturally have some collateral with it; that it would be very easy with collateral or, I would put it in this way, that in order to borrow $60,000 in money one might not necessarily himself be worth $60,000. If you purchase a piece of real estate which is worth a hundred thousand dollars, you may not be worth more than $20,000, but you may be able to borrow $70,000 or $80,000 on that property, while you yourself are not worth over $20,000. I do not wish to make an answer to that question which is prejudicial; if he wishes to know whether I had $60,000 at my own command I will certainly give him an answer.

213

(Question repeated.)

The MASTER: I think, Mr. Hanson, you can give a yes or no answer to that question.

A. On my own promise to pay that amount I don't think I could.

X 20. I will ask you if your financial condition was such at the date of this transaction that you could have purchased and handled a property of this kind?

A. Not without aid; I think I have shown that I would have received the aid that was necessary.

X 21. In this transaction how large an interest did you personally have?

A. My interest would have been 15 per cent.

X 22. How was that interest to be paid for?

A. I don't understand.

X 23. Money or services?

A. In money, in value.

X 24. You were to pay 15 per centum of the purchase price?

A. Of the property.

X 25. Mr. Potter had how large an interest?

A. Mr. Wescott had 25 per cent., I had 15, and Mr. Potter the balance.

X 26. He had a greater interest than both of you?

A. Yes; he would do what he chose with the balance; I don't know how it was to be arranged.

X 27. Did you offer Mr. Mulvane a check for $60,000?

A. We had no reason to offer him a check for $60,000; we were to pay the money when the contract was signed.

X 28. I am not asking your reasons or your argument.

A. No, we did not.

X 29. Did you tender him that amount of money?

A. No.

X 30. Did you at any time have a check for that amount of money payable to his order?

A. I cannot state that one was so drawn.

X 31. If there was no perceptible difference in your mind between the contract which Mr. Mulvane and you had signed and the one which you tendered him to sign why did you not offer him $60,000 under the first contract?

A. Because the first contract stated that a subsequent one should be drawn upon the signing of which the money should be paid.

X 32. That was the only reason?

214 A. That was the only one that I recall now.

X 33. Although you saw no difference between the contracts?

A. In that respect there was a difference.

X 34. There was a difference in regard to the payment of the money?

A. Yes.

X 35. What occasioned that difference?

A. Well, I presume one reason may have been that at the time we signed the contract it was too late to procure the funds that night; it was about six or half past six o'clock Saturday night.

X 36. Had your conference with Mr. Burr anything to do with it? Did that furnish an additional reason?

A. Not to my mind.

X 37. Why did you have a conference with Mr. Burr?

A. I personally had none.

X 38. Why was there any desire to have a conference with Mr. Burr?

A. Mr. Mulvane requested it, suggested it.

X 39. Was that the only motive?

A. I had none myself.

X 40. You were satisfied to pay him the money without a conference with Mr. Burr?

A. We had made an agreement to make the payment at the bank, but as far as that was concerned my mind does not suggest any reason at all.

X 41. Did you have any conference with Mr. Potter in regard to conferring with Mr. Burr?

A. I do not personally recall that I did.

X 42. Were you present at any conference at which Mr. Potter was present when the subject was discussed?

A. I do not remember.

X 43. Did you at any time yourself hear Mr. Potter discussing the question of a conference with Mr. Burr?

A. I do not personally think that I did.

X 44. Did you hear him say anything about the conference after it took place, as to what Mr. Burr had said?

A. I don't remember that.

X 45. Have you ever heard what Mr. Burr said at that conference?

A. Mr. Wescott told me.

X 46. When?

A. I think immediately afterwards.

X 47. Was that before you saw Mr. Mulvane on Monday?

A. No. I had seen Mr. Mulvane twice before I saw Mr. Wescott.

215 X 48. Well, before you and Mr. Wescott together saw Mr. Mulvane had he told you the result of this conference?

A. I think he had.

X 49. The paper which you drafted and showed to Mr. Mulvane in the presence of Mr. Wescott was the identical paper which you subsequently together presented to him, was it?

A. I think so.

X 50. You did not redraft it?

A. I think not.

X 51. Mr. Wescott did not redraft it?

A. No.

X 52. Then the draft was made by you and not by Mr. Wescott?

A. Yes.

X 53. The one which Mr. Mulvane took away and returned what purported to be a copy to you?

A. Yes, sir; think it was in my handwriting; that is my recollection of it.

X 54. Had you communicated to Mr. Wescott before you and he saw Mr. Mulvane together that Mr. Mulvane had rejected that draft?

A. My impression is that I did, but I don't recollect it; that is my impression.

X 55. You very naturally would, of course?

A. Yes.

X 56. I believe you said you offered Mr. Mulvane no money?

A. No.

X 57. Do you know anything about consulting the attorney to whom Mr. Wescott referred?

A. Yes.

X 58. How soon after the final interview with Mr. Mulvane did you lay the facts before his attorney?

A. I could not state that absolutely, because it was not done in Boston.

SAM'L HANSON.

J. HERBERT SHEDD, a witness called on behalf of the complainants, being duly sworn, testified as follows in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

Int. 1. What is your name, place of residence and occupation?

A. J. Herbert Shedd; Providence; civil engineer.

2. How long have you been following the occupation of civil engineer?

A. I first opened an independent office in 1856; that was in Boston.

216 3. Have you devoted any time or particular attention to the construction of water works?

A. That has been a specialty with me for nearly thirty years, twenty-five at least.

4. Have you ever examined the system of water works in the city of Topeka, Kansas?

A. I never have.

5. From your experience in following your profession are you able to testify as to the value of water-works property?

A. I think I can approximately.

6. Well, from such experience what would be, according to your estimate, the value of a water plant in a western city having 45,000 people, with 36½ miles of iron pipe, laid with proper laterals, &c., with 290 fire-hydrants set, and proper sizes of pipe for supplying water for distribution for domestic and fire purposes, with two Holly quadruplex engines of 3,000,000 gallons capacity, and one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity each twenty-four hours, with ample boiler capacity, with the pumps, with plenty of water, with a consumption of water in the city of 900,000 gallons per day on an average, with an extended pipe system, so that an additional income of say, 25 per cent., or $14,000, could be secured without any great expense other than laying service pipes, having, say, an income of $56,000, to which add 25 per cent. for the extension, making $70,000, with operating expenses of $11,000 and interest charges of $13,000, and with a net income of $46,000? What, in your judgment, would be the value of a plant of that character?

A. It is to be assumed that the works are of a permanent character, not requiring more for renewal than good works require?

7. Yes, sir.

A. I think about $780,000.

8. Does that include the franchise?
A. That includes the franchise.

J. HERBERT SHEDD,
By H. P. DILLON, *Master.*

It is agreed that the foregoing deposition may be signed by the master in behalf of Mr. Shedd, with the same effect as if signed by him.

ASA P. POTTER, a witness called on behalf of the complainants, being duly sworn, testifies as follows, in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

217 Int. 1. What is your name, place of residence and occupation?

A. Asa P. Potter; Boston; president of the Maverick national bank.

2. Are you acquainted with the complainants, Mr. Wescott and Mr. Hanson?

A. Yes.

3. I wish you would go on and state briefly what connection, if any, with relation to the subject-matter of this litigation you as president of the Maverick bank or the bank itself bore to the transaction?

A. Well, a part of the business of our bank is selling bonds, and a large portion of our business, especially, selling water bonds. We buy bonds of contractors and owners of water works from time to time, and occasionally, it has been necessary or desirable to purchase the entire plant, as we did in the case of the Springfield works. Mr. Hanson is in the employ of the bank and Mr. Wescott is a man that I have personally known for a great many years, and, regarding him as a thorough expert in water bonds and water works, and a man of good business experience and capacity, we have relied upon him to look at the practical part and take charge of the practical part of any work of the latter kind. In this instance we were about buying or negotiating for the Springfield works in Missouri and Mr. Hanson and Mr. Wescott went West for us, Mr. Hanson to consider whether, if the property was bought under proper terms, we could sell the bonds, and Mr. Wescott to determine whether the works could be bought at a price within Mr. Hanson's judgment. We relied, in fact, upon his practical knowledge entirely. While they were on that trip they went to several places and among others to Topeka. Mr. Hanson wrote me, or telegraphed me, that they were going to Topeka. On their return from Topeka Mr. Hanson reported to me the conversation or interview he had with Mr. Mulvane, substantially, as Mr. Wescott has testified to here, and then as letters came from Mr. Mulvane to Mr. Wescott they were sent to me. I saw them and kept cognizant of the fact that the trade was in train and would be consummated and carried out. At the time Mr. Mulvane came here I did not see him. I did not see him because I do not recall that I knew that he was here until the day that Mr. Wescott came to Boston and he and Mr. Hanson met him. They

left the bank to come here, and, after their interview, I suggested to Mr. Hanson that I would like to see Mr. Mulvane, like to meet him, and he said he would ask him to come down to the bank; otherwise I should have come here to see him. Mr. Hanson left to ask him to come down to see me. He did not come. That was on
218 the day that they had their interview and signed the contract to purchase the works, on Saturday.

4. What arrangement was made by Mr. Hanson and Mr. Wescott with you or with your bank with reference to procuring the funds to meet the payments as they fell due under the terms of the contract?

A. They reported to me, either one or both of them, the terms of the contract. I said it was entirely agreeable to us and we would furnish the money and the money was ready. I don't remember just what day it was that the $60,000 was wanted, but I presume from the testimony it was on Monday that Mr. Hanson spoke to me and I said of course they could have a New York check the same as they could have Boston funds; it made no difference to us.

5. The funds were there subject to the control of Mr. Hanson and Mr. Wescott, were they?

A. Oh, yes, sir; I told the cashier to give them a check when they asked for it.

6. Do you know whether or not Mr. Hanson or Mr. Wescott would have been able to meet the payments as they fell due?

A. We should have furnished the money.

7. Was an arrangement of that kind made?

A. Certainly.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. You were, then, as I understand, Mr. Potter, to furnish all the money for this transaction?

A. Yes, sir.

X 2. The Maverick national bank is an incorporated bank, is it not?

A. Yes, sir, a national bank.

X 3. Incorporated under the laws of the United States as a national bank?

A. Yes.

X 4. Is it otherwise incorporated?

A. No.

Redirect examination.

By Mr. SMITH:

Int. 8. Mr. Potter, after your interview with Mr. Wescott and Mr. Hanson on December 16, did you procure from any person here the address of Mr. Mulvane?

A. I did; yes, sir.

9. From whom?

A. From Mr. Burr, of the Bank of North America.

10. What did you do after obtaining his address?

219 A. I wrote him a letter; Mr. Hanson told me that Mr. Mulvane had left word that any communication could be addressed to him, or his address could be found, at the Bank of North America. I went to the Bank of North America and saw Mr. Burr, and he inquired of his cashier if Mr. Mulvane had gone, and if so, if he had left an address, and he told him that he had left his address as being the Fourth national bank in New York, and I wrote him a letter that day, I think.

11. Have you a copy of the letter that you wrote him that day?

A. Yes, sir; this is a copy of it, I presume.

12. That letter was mailed and postage paid?

A. Yes, sir; that letter was mailed and postage paid, and to be returned if not called for.

13. Has it ever been received?

A. No, sir; it has never been returned.

14. Did you ever hear anything from Mr. Mulvane in response to this letter?

A. I never did.

(A copy of the letter referred to by the witness is here attached and marked "Exhibit E.")

15. Mr. Potter, from your cross-examination am I to understand that the bank was dealing in this capital stock?

A. No, sir; I did not mean to say so; I did not mean to say that the bank was buying the stock. The bank never had bought stock nor did not intend to in that case.

16. What did you intend to say?

A. I meant to say that we were in the habit of buying bonds, that we were large dealers in bonds, that we were dealers in water bonds especially, and that we contemplated buying this issue of bonds when the company should have been reorganized. I meant to say that during the interim we were to furnish $60,000; it was first $50,000 and then $60,000. That was what I meant to say.

17. Is there any other explanation which you desire to make in connection with your testimony?

A. I do not recall any, sir.

ASA P. POTTER.

Indorsed: No. 6448. Testimony. G. P. Wescott *et al. vs.* Joab Mulvane. Filed Mar. 3, 1892. Geo. F. Sharitt, clerk.

The undersigned, Hiram P. Dillon, respectfully states that, pursuant to an order of the court made in the suit of George P. Wescott *vs.* Joab Mulvane on the — day of December, 1890, whereby he was appointed

for the purpose of taking testimony, that testimony was taken 220 pursuant thereto and is filed in this suit; that the exhibits attached to the testimony consist both of the original papers and copies. Where copies are attached it is by agreement of counsel that they shall be of the same force and effect as the originals; and

I certify that wherever a copy is made as an exhibit, it has b
verified and is a correct copy of the original.

HIRAM P. DILLON, *Master*

Master's fees, —.

EXHIBIT "A," WESCOTT'S TESTIMONY.

Joab Mulvane, pres't; M. O'Brien, sec't'y.

The Topeka Water Supply Company. Office, 111 East Seve
street.

TOPEKA, *Nov.* 13, 188

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his a
ciates, own the stock of the Topeka Water Supply Company, s
Mulvane owning, in his own right, a majority thereof, and be
disposed to sell his stock and to advise his associates to sell th
stock in said company, on the terms and conditions hereinafter stat
and whereas, Geo. P. Wescott, of Portland, and Samuel Han
and associates desire to purchase the capital stock and property
said water company, it is hereby agreed that said Wescott and Han
will pay said Mulvane and associates par for said stock and to pa
Joab Mulvane, Esq., the further sum of one hundred thousand
lars for the control and carrying out of the above sale and transfe
said stock to said Wescott and Hanson, delivery thereof to be made
New York or Boston, as said Mulvane may elect. Said Mulvane,
his part, agrees to deliver said stock, amounting to $400,000, par va
on or before January 1st, 1890, and also to perform such services
the formation of a new company, if one is required, to be perform
as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT
SAMUEL HANSON

EXHIBIT "B," WESCOTT'S TESTIMONY. H. P. Dillon, Master.

Engineer's Report.

To Messrs. Coffin & Stanton.

GENTLEMEN: I beg to submit to you the following report on
water works of Topeka, Kansas, as embodying the results of my
amination of said works, as per your instructions:

The city of Topeka has at present a population of at least 45,0
not including several suburbs that are not as yet incorpora
221 with the city. It is located on the Kansas river, 66 miles f
Kansas City, in the midst of a fine agricultural country,
is growing very rapidly, both in wealth and population.

The principal business is manufacturing and trade with farm
of the surrounding country, and the excellent railroad connecti
both east and west, render it an important centre for distribution
grain and other products.

Railroads.

The railroads are:
The Kansas division of the Union Pacific R. R.
Atchison, Topeka & Santa Fe R. R.
St. Joseph branch of Chicago, Rock Island & Pacific R. R.
Kansas, Nebraska & Dakota R. R.

Conditions of city.

The financial condition of the city is good and its credit high. A large amount of work is now being done on the streets, and several miles of asphalt and block paving have been laid during the past year. The class of houses is uniformly good, and there are many handsome and costly buildings.

Class of works.

The city is supplied with water from works operated by a company organized under the laws of the State of Kansas and operating under a franchise granted by the city of Topeka in 1881. The works were built in 1881–'82 by Messrs. Russell & Alexander, as contractors for the company, and since the date of first construction extensions have been made by the company as the growth of the town required.

The works are what is known as the direct-pressure system, the water being forced by the pumping machinery directly into the mains without first passing through a stand pipe or reservoir. The topography of the site on which the city is built is well adapted for the efficient operation of works of this description, and the low price of coal renders an economical operation of the plant possible. The service rendered at present is good, and the fire protection ample.

Pumping station.

The pumping station is located on the banks of the Kansas river, at the foot of Topeka avenue, and is about a half mile from the center of the town. The buildings are well and substantially built of brick, are neatly finished, and are divided into engine-room, boiler-room and coal-room. They are ample size for future extensions of pumping plant. The smokestack is of brick.

222 The pumping plant consists of two Holly quadruplex engines of a capacity of 3,000,000 gallons per 24 hours, and of one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity per 24 hours. These engines are well arranged, are in excellent condition, and are capable of supplying the consumption in the city for many years.

The boiler plant consists of three horizontal tubular boilers of about fifty-horse power each. They are well set, and are ample for the needs of the pumping plant.

Water supply.

The water supply is taken from four open wells sunk near the banks of the river, in a sand and gravel stratum, through which the water filters. These wells are sunk to a depth of about six feet below

the river bottom and are connected by a cast-iron pipe, rendering the entire storage capacity and filtering area available at any moment. There is also a 12-inch connection direct to river for use in an emergency.

The wells are of the following dimensions:

First well	80 feet diameter
Second well	60 feet diameter
Third and fourth wells	18 feet diameter

They are all about twenty-six feet in depth and lined with stone masonry that extends to about eight feet above the surface of the ground, effectually excluding surface water. All are roofed in and provided with proper ventilators. The 80-foot well was the first one built at the time of the first construction of the works, and the other three have been added from time to time as the consumption of water increased.

The sand and gravel stratum in which the wells are sunk, and from which the water is obtained, is found underlying the bed of the Kansas river and the low lands along its banks for many miles both above and below the city of Topeka, and supplies of water are obtained from it at many points. Its depth and thickness vary at different places, but it is usually about eight feet in thickness and is overlain with a deposit of clay or alluvium. It is a very coarse, clean sand mixed with gravel and pebbles, and admits water freely. The water obtained from it does not differ from that of the Kansas river, except that impurities held in suspension have been filtered out. The water is of excellent quality, and suitable for all purposes of domestic or manufacturing use.

It is the only supply available for the city of Topeka, unless water be taken direct from the river, and those who do not use it depend on cisterns and a few shallow wells. I can find no complaint
223 as to its quality among consumers. As to quantity, I consider that the present wells will furnish an ample supply for several years, and additional wells can be sunk at slight expense, increasing the supply indefinitely. The franchise also allows water to be taken direct from the river.

Real estate.

The real estate owned by the company, and on which the wells and engine-house are located, is about nine acres in extent, extending along the river bank some one thousand feet and being from four hundred to five hundred feet in depth. There is ample room for the location of additional wells should they be needed.

Pipe system.

The pipe system consists of thirty-six and one-half miles of pipe.

I have carefully examined the pipe lines and find the system well proportioned for supplying the area at present covered, and that the extensions and additions made during the past few years have been intelligently planned and carried out and add materially to the general efficiency of the system.

Hydrants and valves.

There are at present in use and rented by the city 290 double-nozzle hydrants located on the pipe lines named. The hydrants are of Holly manufacturing, of good pattern.

The valves in use are made by the Ludlow Valve Company.

Extensions.

The first extensions put in should be lines of 12-inch and 16-inch pipe to meet the growing demands of the city and to increase the supply in the area at present supplied by 6" and 4" pipe.

These lines proposed need not all be laid at once, but the improvement contemplated can be extended over several months, the large pipe replacing smaller sizes when put in. On all of these lines a large amount of private consumption can be obtained, and in the outlying districts hydrants will be located as per the terms of the franchise, giving a revenue that will repay the outlay made.

Consumption.

The pumping report for the year 1888, shows a total of 298,393,099 gallons pumped, or an average of 817,515 gallons per day of 24 hours.

This consumption, however, would be varying, and in dry seasons the wells have been called upon to supply at least 2,000,000
224 per day with the present number of consumers. I should estimate the average consumption during the next five years to be from 1,500,000 to 2,000,000 gallons daily, with a maximum at certain seasons of a- least 3,000,000. This supply can be obtained from the present wells.

Should it ever become necessary to do so, an increased supply can be obtained by sinking more wells similar to those now in use by means of a system of tube wells, or by taking water directly from the river and forcing it through mechanical filters. None of these methods would involve serious expense.

Earning capacity.

I submit the following table of receipts for the year- 1886, 1887, 1888.

These various items have been taken from the monthly reports of superintendent, and have been verified by inspections of company's books.

Year 1886, $34,531.33; 1887, $48,279.86; 1888, $56,153.57.

Number consumers, January, 1889, 1,872.

Increase since January, 1888, 9 %.

Amount paid by city at present, $14,110.00.

Number gallons pumped in 1888, 298,393,099.

Cost pumping 1,000 gallons, 4¾ cents.

Average rate paid per consumer, about $25.00.

I would call your attention to the comparatively small number of consumers for the length of pipe lines, and to the large average rate paid by each one. This would seem to indicate that the private

consumption is mainly by well-to-do people, who use water for sprinkling and stable purposes, baths, &c., and that there is a wide field for increased consumption among the smaller property-holders.

It is my opinion that the private consumption could be increased over 24 % on the present line of pipe and the same average maintained by future extensions.

Summary.

1st. In conclusion, I would say I consider the pumping machinery, boilers, etc., in their present condition, equal to the supply of the city for the present and for several years to come.

2nd. That the water supply is ample, can be easily and cheaply increased should it be necessary to do so, and that the quality of the water furnished is good.

3rd. I recommend that in future extensions no small pipe be laid, but that the present long lines of 4-inch be replaced by large pipe and the 4-inch on these lines be taken up and used for minor extensions.

225 4th. That the lines of 16-inch and 12-inch in central part of city be gradually extended, and replace smaller lines now in use.

5th. That the plant is earning an income of at least $56,000 per year, and that this can be increased fully 25 per cent. on the present lines of pipe. A fair estimate for the earnings at the expiration of next five years would be not less than $100,000.

Trusting I have covered all the points on which you desired information as per your letter of instruction,

I am, yours respectfully, E. F. FULLER.

EXHIBIT "C," WESCOTT'S TESTIMONY.

PORTLAND, ME., *Dec. 17th*, 1889.

I, Geo. P. Wescott, of Portland, Maine, make the following statement in regard to the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Company, Topeka, Kansas. Said negotiations being conducted on the one side by the said Mulvane, owning, in his own right, more than a majority of the capital stock of the Topeka Water Supply Company (capital stock of said company being $400,000,) and on the other side by Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts.

On the twelfth day of November, in the afternoon, myself and Mr. Hanson were at the office of Mr. Mulvane, in Topeka, Kansas, pursuant to an arrangement made between said Mulvane and Hanson some three or four weeks prior to this date. We found Mr. Mulvane at his office and obtained from him his consent to make such examination of the plant and works of the company as we desired to make.

On the following day it was arranged to meet Mr. Mulvane in the morning and examine the books of the corporation and later to enter

into negotiations for the purchase of the plant. Accordingly we visited the pumping station, on the banks of the Kansas river and made an inspection of the entire city, as we deemed desirable and proper, relating to the standing of the affairs of this corporation.

On the following morning we met Mr. Mulvane and went with him to examine the books of the corporation at the office of the water company. Finding everything in satisfactory condition it was arranged to meet Mr. Mulvane at the hotel after dinner and see if we could agree on the price to be paid for the property. At about half past two Mr. Mulvane came to the hotel, with Mr. Shaw (in
226 the employ of the company). Mr. Shaw having been brought to the hotel at our request, to interview him in regard to the pipe distribution of the company, of its condition, etc. After Mr. Shaw had left the room, negotiations were opened with Mr. Mulvane, at which time Mr. Mulvane expressed a willingness to undertake the purchase of the balance of the capital stock and sell the entire property to us for the sum of $500,000. This sum Hanson and myself deemed too large, and had previously offered him $450,000. Finally this sum was raised to $475,000, which was declined by Mr. Mulvane, and it was agreed that we were to meet Mr. Mulvane at 5 o'clock in the afternoon and would then determine if we would pay the sum asked by him, namely, $500,000, or not.

At 5 p. m. we met at his office by appointment and went into a private room attached to the bank, adjoining his office, and there we agreed to pay him the sum asked by him, namely, $500,000. With that object in view, the following memorandum was prepared for signatures of the parties, which was satisfactory to Mr. Mulvane:

Copy.

Joab Mulvane, prst.; M. O'Brien, sec'ty.

The Topeka Water Supply Company. Office, 111 East Seventh street.

TOPEKA, *Nov.* 13, 1889.

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his associates, own the stock of the Topeka Water Supply Company, said Mulvane owning, in his own right, a majority thereof, and being disposed to sell his stock and to advise his associates to sell their stock in said company, on the terms and conditions hereinafter stated; and, whereas, Geo. P. Wescott, of Portland, and Samuel Hanson and associates desire to purchase the capital stock and property of said water company.

It is hereby agreed that said Wescott and Hanson will pay said Mulvane and associates par for said stock, and to pay to Joab Mulvane, Esq., the further sum of one hundred thousand dollars for the control and carrying out of the above sale and transfer of said stock to said Wescott and Hanson, delivery thereof to be made in New York or Boston, as said Mulvane may elect. Said Mulvane on his part agrees to deliver said stock, amounting to $400,000, par value, on or before January 1st, 1890; also to perform such services in for-

mation of a new company, if one is required, to be performed as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON. [SEAL.]

227 The foregoing agreement was written out in duplicate, we expecting that Mr. Mulvane would sign one and we the other. We signed ours, as the signatures appear above, but Mr. Mulvane said he could not then sign a paper which bound him to do something which he did not know if he could do or not, but that he would take the matter under consideration and at once obtain the consent of his associates, and within ten days he would send us his paper, duly signed, and we might return ours duly signed, or he would declare the trade off.

At the expiration of said ten days, namely, November 22nd, he addressed the following letter to me:

DEAR SIR: I cannot write you anything definite today. Will write you again, or may see you, as I expect to be in Boston in the near future, and I will advise you when I will go East soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

I replied at once that I should be pleased to meet him in Boston any day that he might name and that my address was the Parker house, Boston.

On December 4th, he wrote me as follows:

DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker?

My right arm is yet in limbo and writing is a difficult task.

Respectfully yours, JOAB MULVANE.

December 13th I received the following telegram, dated in Boston:

Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE.

I replied that I would meet him in Boston on Saturday, at 11.30 a.m. At 11.30 a. m. I was at the Parker house, and waited until 12.45 for Mr. Mulvane to keep his appointment. At that time he came and explained his delay had been occasioned by a meeting of the
228 directors of his railroad, where he was required to make a quorum. Mr. Mulvane, Hanson and myself retired to room 304, on the second floor, where Mr. Mulvane stated that he now owned in his own right $388,000 of the stock of the Topeka Water Supply Com-

pany, leaving but $12,000 of stock to be acquired, which he expected to have in a very few days, so that then he was in a position to sell and deliver the entire stock, except $12,000, that he had actually purchased the stock and now owned it, but that it had cost him more money than he expected and that he could not sell the stock at the price he had named in Topeka, that he should require at least $50,000 more than the price then named. After considerable talk and our insisting, that while he had a perfect right to declare the transaction off, yet we understood it to be agreed that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and that, inasmuch as he had carried it out and could accomplish it, we certainly felt that the sum which we had then offered should be accepted by him and the stock delivered to us, that he had been acting as our agent in acquiring the stock, and that it should be delivered to us. After considerable negotiation, he finally said that $25,000 additional or $525,000, was the very lowest sum at which he would sell the property, and would require $50,000 paid on account at time of signing the contract. After further conversation, Mr. Hanson and myself retired from the room for a conference with our associates, to see if they would pay the $25,000 extra or not. Being unable to find but one of our associates, and he being adverse to paying the additional sum, we retired to the room and told Mr. Mulvane that $500,000 was our best offer and must be accepted today. He absolutely declined to sell at any less sum than $525,000, and declared that all negotiations were off. We put on our coats and hats and started to leave the room, but in reply to a question as to how the matter was left, we intimated to Mr. Mulvane that we were left in a peculiar manner with our friends, inasmuch as we had gone to Topeka and made what we supposed to be a trade for the plant, conditionally that the stockholders would sell the stock but now we found that, while the stockholders had agreed to sell the stock and he had bought it in our interest, we were being charged a higher sum and we could not well explain to our associates this advance, and that we really preferred to abandon the whole trade rather than to have any suspicion cast on us by our associates that we had not explained to them the whole story when we returned from Topeka. Mr. Mulvane replied that he realized the position which we occupied, and that he was now inclined to accept
our proposition, provided we would pay him the sum of $60,000
229 cash, on signing of the contract instead of $50,000 before asked
for; that he could use that sum to advantage and would like to have it. He also stated that he had but $40,000 of the stock in hand, but he felt sure that Mr. Burr, the president of the Bank of North America, in the city of Boston, would be willing to guarantee that the payment of $60,000 on account would be a safe thing for us to do. Accordingly, after considerable negotiation and discussion, the following paper was drawn up and duly signed by all the parties. When Mr. Mulvane had put his signature to the paper, he said to us: "There; that is settled, now. You have my signature, which you didn't have

when we were in Topeka." The following is a copy of the agreement made in Boston:

BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February 20th, in said Wescott & Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE.

To George P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT,
SAMUEL HANSON.

It was now half past six p. m., and I was to take the train for Portland at seven o'clock. I bade them good night, with the understanding that Mr. Hanson and Mr. Mulvane would prepare the contract on Monday morning and that I would return to Boston Monday at 1.30 to sign the contract and complete payment, agreeable to the terms of agreement signed Saturday evening.

230

Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay to Mr. Mulvane, to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible, and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane; in reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party and he had the fullest confidence in his integrity; I then stated to him that I was to pay Mr. Mulvane $60,000, and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended; his

reply was prompt and to the point that he would not guarantee the life of any man, which was, in effect, what I was asking him to do; further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself; he didn't believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out; I returned to the Maverick bank at once and stated what Mr. Burr had said both to Mr. Hanson and to the president of the bank, Mr. Asa Potter; Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself, but stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when we would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make; that Mr. Mulvane had, in the morning, declined to come to the bank to confer with him, and had also declined to have the contract done by a lawyer; that he wanted it to be as simple as possible.

At 12:30 p. m. Mr. Hanson and myself went to the Parker house and met Mr. Mulvane in the office and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson, to look over and asked him what changes he would suggest. The following is a copy of the contract:

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Me., and Samuel Hanson, of Boston, Mass., party of the second part.

231 The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th day of February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company, before named, which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of — America.

The party of the second part also agrees to pay to the party

of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the first day of January, 1890, free from all debts and oncumberances of every kind, except the funded debt, consisting of one hundred and twenty thousand first-mortgage bonds.

He at once objected to our taking possession of the company on January 1st, because he had not then obtained the last $12,000 of stock and it might be impossible to do so before January 1st. We then suggested making a change, so that the possession of the company should be taken after the delivery of all the stock, agreeable to the terms of the agreement of December 14th. He did not seem satisfied with this arrangement but did not make further objection to the contract as submitted. In conversation we told him that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made
232 necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for and did not think that Mr. Mulvane should ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person; then he, Mulvane, said I understand you will not put up the money unless I put up the stock and this means more delay. We replied, that inasmuch as Mr. Burr would not guarantee his so doing we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home, and his well-recognized financial ability to make good his promises would be accepted here readily and that we should make the payment of $60,000 without his putting anything against it except his receipt on account, and he thought the recommendation Mr. Burr had given him was ample, and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr.

At this point Mr. Hanson said to Mr. Mulvane that he certainly should not ask us to do what he would not do himself, and that we would not expect him to trust us for any part of the payment down, and that in support of our ability and competence to pay, that Mr. Wescott had a letter from the Casco bank as to his standing in Portland, which was equally as high as that which Mr. Mulvane had in his own town. At this point I passed Mr. Mul-

vane the following letter for him to read, stating to him that before our interview with him on the 14th, the cashier of the Casco bank had been asked for a letter, to be addressed to him, which he had given me, but when he asked for a deposit of $60,000 I did not suppose that the letter would be any object for him to think of, or even to read, and I hadn't presented the letter to him, and did not do it now, only to show that my standing was equal to that given him by Mr. Burr. A copy of the letter is as follows:

233 The Casco National Bank of Portland, Maine.

DECEMBER 13TH, 1889.

Joab Mulvane, Esq., Topeka, Kansas.

DEAR SIR: I address you this letter that you may know the reputation for responsibility which Hon. Geo. P. Wescott of this city enjoys, should you desire such knowledge.

Mr. Wescott is the surviving partner of the firm of Joseph Wescott and Son, and as a business man has been engaged in some of the largest industrial enterprises in this section, and with uniform success in results. He is considered in this community to be a man of wealth, and is always equal to his agreements. We have known him in this bank as one of its most valuable directors for more than eighteen years, and have no hesitation in recommending him to any one with whom he may have business relations, as a man perfectly reliable and responsible to the extent of any engagements he would make. This is our opinion of him, and we feel it is the sentiment of all those who know him in this city and State.

Yours respectfully,

(Signed) M. R. GODING, *Cashier.*

Mr. Mulvane, having read the letter, said that the recommendation was certainly good enough to show that we were acting in good faith throughout.

Room 63 being very cold we then went to room 304 and continued our negotiations; Mr. Mulvane had possession of the memorandum which Mr. Hanson had drawn, and had it in his pocket; I asked for the copy and undertook to get Mr. Mulvane to agree to such modifications of the contract as would meet his views and make it so that he would sign the same; he absolutely declined to discuss the contract or to suggest any change to be made in any manner whatever; I made some changes in pencil on the memorandum, which will appear in my handwriting; Mr. Mulvane left the room and when he came back about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room; we called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it; we assured him that we had no copy, and that it was only a rough draft on which we had asked him to make such changes as would meet his views,

but on which he had declined to make any suggestions or enter
234 into any conference whatever in relation to the matter; he, being pressed for the paper, agreed to have a copy made and return the paper at once; at half past six he returned the typewriter's copy to us, saying that he should keep the original, and that all negotiations were off, so far as he was concerned; we then asked him if we could have an interview with him in the morning at the Bank of North America, where we had no doubt that, with Mr. Burr present, we could arrange all matters in an amicable and satisfactory manner; he declined to hold any further interviews with us, but said that any communication we had to make, left at the Bank of North America, would be considered by him, but that he didn't want to have any further conversation with us on present negotiations.

GEO. P. WESCOTT.

I, Samuel Hanson, of Boston, Massachusetts, being present at each and all of the interviews pending the making of the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Co., Topeka, Kansas, hereby certify that I have read the foregoing statement made by Geo. P. Wescott, of Portland, Maine, relating thereto, and find the same to be correct, according to the best of my recollection.

I would, however, make the following additions to his statement: My recollection is that when we referred to making payments of $60,000 at National Bank of North America, Mr. Mulvane said that Mr. Burr would give us such assurances that the matter would be perfectly satisfactory to us, and with that statement we left the matter. I also referred him to the Maverick national bank in regard to my own ability to perform the contract, stating that Mr. Potter was one of the parties at interest. Mr. Mulvane also stated that his reason for asking a price in excess of $500,000 was that he had not bought a single share of the stock for which he had not paid more than par. I would also add that on the 17th inst. Mr. Potter wrote Mr. Mulvane, at New York, expressing surprise at his action and requesting that all papers be laid before Mr. Burr, the president of the Bank of North America, and we abide by his decision; but up to this date no reply has been received.

SAMUEL HANSON.

Boston, December 21, 1889.

235 No. 5.

Statement Made by Geo. P. Wescott and Samuel Hanson, Dec'r 17 & 21, 1889.

COMMONWEALTH OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

On this twenty-eighth day of January, A. D. 1890, before me, Samuel Jennison, a commissioner of the State of Kansas, residing in Boston, duly commissioned and qualified to take affidavits, &c., for

said State, personally appeared in said Boston Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of said Boston, and severally made oath that the statements and all matters and things set forth in their writings hereto attached and signed by them respectively are true to the best of their knowledge and belief.

In witness whereof I have hereto set my hand and official [SEAL.] seal, at said Boston, this 28th day of January, A. D. 1890.

SAMUEL JENNISON,
Commissioner for Kansas in Boston.

Indorsed: No. 6448. U. S. circuit court. Samuel Hanson *et al.* vs. Joab Mulvane *et al.* Affidavit of Geo. P. Wescott. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

EXHIBIT "D," WESCOTT'S TESTIMONY.

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Mass., party of the second part.

The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand shares, of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement; two hundred thousand dollars on the 10th day of February, 1890; one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to
236 pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company before named; which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of North America.

The party of the second part also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum on the sums amounting to four hundred and forty thousand dollars until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the 1st day of Janu-

ary, 1890, free from all debts and incumbrances of every kind, e cept the funded debt, consisting of one hundred and twenty th sand first-mortgage bonds.

EXHIBIT "E," POTTER'S TESTIMONY.

H. P. Dillon, master.

(Copy.)

MAVERICK NATIONAL BANK,
BOSTON, *December 17th*, 1889

Joab Mulvane, Esq., c/o Fourth nat. bank, New York city.

DEAR SIR: Regarding the purchase of the stock of the Topeka water works, in which I am an interested party, and our Mr. Hagerson has conferred with you upon, I am at a loss to understand the position you have taken in the matter.

I see nothing inconsistent in the agreement as written with the preliminary letter addressed by yourself.

I beg to ask your permission to refer the matter and the papers to our mutual friend, Mr. Isaac T. Burr, and am willing to abide by his decision and conclusion.

Yours truly,
(Signed) ASA P. POTTER

Indorsed: # 6448. George P. Wescott *vs.* Joab Mulvane. Exhibits to testimony of Wescott & Potter. Filed M'ch 3, 1892. G. F. Sharitt, cl'k.

237 ROBERT H. WEEMS, first being duly sworn, says:

By Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. My name is Robert H. Weems; my age is 43; I reside in Brooklyn, and my occupation, a banker.

Q. How long have you been engaged in the banking business?

A. About 25 years, off and on.

Q. During such time have you had reason to investigate the value of water company stock and water company plants in various cities through the West?

A. I have.

Q. Have you become interested in any water properties throughout the West during that period of time?

A. For many years I made a specialty of negotiating the bonds of water companies and have sold such securities to the amount of millions of dollars.

Q. From such experience are you able to determine the value of a water plant in a western city?

A. I consider myself competent.

Q. What, in your judgment, would be the value of a water plant including the franchise, in a city of 45,000 population; said wa

plant having 36½ miles of pipe (cast iron) laid, with proper gates, etc., with 290 fire-hydrants set, with proper size of pipe for supplying water for domestic and fire purposes, with two Holly quadruplex engines of 3,000,000 gallons capacity, and one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity, each 24 hours, with ample boiler capacity for the pumps, with plenty of water; the consumption of water being an average of 900,000 gallons per day, with an extended pipe system; so that an additional income of 25% or $14,000 could be secured *without any great expense*, other than laying of service pipe, say having an

Income of		$56,000
25% extra		14,000
		70,000
Operating expenses	11,000	
Interest	13,000	
		24,000
Net income of		46,000

What would be your estimate of the value of property of that character on December 14th, 1889?

238 A. If the franchise had a number of years to run and as is usually the case was renewable for another term of years on its expiration, I should say that a water plant as described with a net income of $59,000 over and above operating expenses, would be worth between $900,000 and $1,000,000 in cash.

ROBT. H. WEEMS.

Indorsed: No. 6448. Testimony. Filed Mar. 3, 1892. Geo. F. Shariff, clerk.

In the Circuit Court of the United States, District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, Defendant.

Petition of said complainants and for leave to submit the question of damages arising under and by virtue of the breach of the contract referred to in said bill to the determination of a jury.

The said complainants herein now come and respectfully show unto the court that since the filing of their bill herein, reference to which is hereby made, and the same made a part hereof, as is fully set out in *hæc verba*, certain persons by the name of Woodbury and Moulton, resident in Portland, Maine, filed a petition for leave to be made parties in this suit, and to set up their rights herein. That the said Woodbury and Moulton were citizens of the same State as the said George P. Wescott, one of the complainants herein. That

the said interest of the said Woodbury and Moulton arose by reference in said bill to the following claim of fact, namely: That, after the said Joab Mulvane had entered into a contract with the said complainants, as set out in said bill of complaint, and in breach and violation of said agreement, he sold the stock by his said agreement with complainants to them agreed to be sold, to Messrs. Coffin & Stanton, of New York, who in turn, and before the filing of said bill, as claimed and alleged, had entered into an arrangement or agreement with the said Woodbury and Moulton, whereby the said Woodbury and Moulton became half owners of the interest claimed to have been purchased by the said Coffin & Stanton.

It further appears by the record in this case, and is a fact, that at the time the bill of complaint was filed herein, and a preliminary injunction allowed thereon, the said Joab Mulvane had not fully performed his said contract by the delivery of the stock aforesaid to the said Coffin & Stanton, and all of the stock was still in his
239 hands. That thereupon the said Coffin & Stanton filed their certain motion to dissolve said injunction upon the grounds *inter alia* that the said Woodbury and Moulton had a substantial interest in the property which was the subject-matter of said suit, and being citizens of the same State as the complainant Wescott, the making of the said Woodbury and Moulton parties thereto would oust the jurisdiction of the court; and thereupon the court upon this ground, and this ground alone, dissolved said injunction, leaving the said bill to stand as against the parties who had been properly brought into court, and of whom jurisdiction had been acquired. That thereupon, and as soon as said injunction was dissolved, the said Joab Mulvane carried out his said contract with the said Coffin & Stanton and transferred to said Coffin & Stanton all and singular the interests and rights which he had contracted to sell and deliver, as appears by said bill of complaint to the complainants herein. That by reason of such transfer he made it impossible to enforce specific performance of said contract as to the said Mulvane.

Your petitioners further allege that the price received by the said Mulvane from the said Coffin & Stanton was fifty thousand dollars in excess of the price which the said complainants had contracted to pay and that the said property so as aforesaid contracted to be sold, and sold by the said Mulvane to the said petitioners was worth a sum largely in excess of that which the said Mulvane had contracted to sell the same for to said petitioners, and that, by reason of his, the said Mulvane's breach of contract and by reason of the acts and doings of the said Mulvane, which placed it beyond his power to perform his said contract and agreement with your petitioners, your petitioners have been largely damaged, to wit: in the sum of one hundred thousand dollars, for which they should have judgment. That it was solely owing and due to the acts and defaults of the said Mulvane subsequent to the execution of said contract that the said property was placed beyond his reach and in such manner as made it impossible for him to specifically perform the same, or for the court to decree such performance; but in justice and good conscience the said bill should be still held by the court to ascertain what, if any

damage has been suffered by your said petitioners on account of the breach of said contract by the said Mulvane, and to ascertain and assess the same.

Wherefore, your petitioners pray that the said bill be retained and the question of damages submitted under proper instructions and proof to the determination of a jury.

All of which is respectfully submitted.

ROSSINGTON, SMITH & DALLAS,
Sol. for Compl'ts.

240 U. S., DIST. OF KS., }
First Division. }

Charles B. Smith being duly sworn, deposes and says that he is one of the solicitors and counsel for the complainants herein; that he has read the foregoing petition and knows that the allegations thereof are true, except and save the amount of damage claimed to have been caused by said breach.

CHAS. BLOOD SMITH.

Subscribed and sworn to before me the 4th day of March,
[SEAL.] 1892.

GEO. F. SHARITT, *Clerk.*

No. 6448. United States circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane. Petition. Filed Mar. 4, 1892. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, att'ys for pl'ff.

Order.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Compl'ts, } No. 6448.
vs.
JOAB MULVANE ET AL. }

Upon application of complainants, it is hereby ordered that they be granted until May 15th, A. D. 1892, to file their brief in this cause, and that said cause be set down for final hearing on the first day of June, A. D. 1892, term of this court at Leavenworth in the district of Kansas, or as soon thereafter as counsel can be heard, and that complainants shall have at said time and place three hours in which to present the matter in open court, if they desire to argue said cause orally.

Dated April 28th, 1892.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. Wescott & Hanson *vs.* Joab Mulvane *et al.* Order. Filed Ap'l 28, 1892. Geo. F. Sharitt, clerk.

Memorandum of Decision.

In the U. S. Circuit Court, District of Kansas.

GEORGE P. WESCOTT ET AL. *against* JOAB MULVANE. } 6448.

This is a bill for the specific performance of a contract for the sale of the Topeka Water Works Company. The contract sought to be specifically enforced is as follows:

241 "BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand (4,000) shares of par value of one hundred dollars ($100.00) per share for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash, on the signing of a contract to be made and entered into as of this date. The consideration named in the said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars to be paid February 10, 1890; one hundred and forty thousand dollars to be paid February 20, 1890, and one hundred thousand dollars to be paid March 20, 1890. Provided, that final payment on the last-named sum of one hundred thousand dollars may be paid on February 20, 1890, if said Wescott and Hanson may elect so to do by giving me five days' notice of such intention, payment to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Massachusetts.

(Signed) JOAB MULVANE.

To George B. Wescott and Smith Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEORGE B. WESCOTT.
SAMUEL HANSON."

The question, and the only question to be determined is whether or not this contract is one which can be specifically enforced; and if that be determined in the affirmative, it is agreed by counsel (Mr. Mulvane having disposed of the property), that the measure of damages shall be one hundred thousand dollars. The contract, it seems to me, is a very plain one, and will therefore not be difficult of construction. If the plaintiffs in the case had complied with the terms of the contract, there is no doubt but what it could be enforced against the defendant. The proposition, as will be seen from a careful examination of the contract, is that the price shall be five hun-

dred thousand dollars, and that sixty thousand dollars of that shall be paid in cash upon the signing of a contract to be made as of the same date. While this seems to contemplate another contract to be executed by the parties at the time of the closing of the deal, yet the terms and conditions of that contract are fully set forth in this memorandum; and had defendants complied with all of its terms, my own view is that they would have needed no other contract as the agreements of the parties; while somewhat informal, perhaps, are fully set forth in this memorandum. They did not, however, comply with the terms of the contract as shown by the testi-
242 mony. By this memorandum, if it is to be taken for the contract between the parties, they were to pay Mr. Mulvane sixty thousand dollars in cash. That does not mean, perhaps, that they should have the currency and hand it to him; but they should at least by the terms of the *the* contract have paid that amount of money to the National Bank of North America, to Mr. Mulvane's credit. That they did not do, although some of the witnesses testify that they were prepared to do so; yet, under the terms of the agreement Mr. Mulvane was not obliged to do anything until they had either paid to him, or the bank specified in the contract, to his credit, the amount agreed to be paid in cash; and that payment by the terms of the agreement should have been made unconditionally. This they did not do, and by reason of their failure to do so Mr. Mulvane had the right to rescind the contract, which he did. Had they made this payment, then, in case Mr. Mulvane declined to execute the additional contract mentioned in the memorandum, the memorandum itself would have been sufficient. While the evidence showed they expressed a willingness to make this payment, yet they did not make or tender payment unconditionally; and Mr. Mulvane saw fit to take advantage — this, as he had the unquestioned right to do, after failure to make the payment, or tender in the manner provided by the terms of the agreement, to declare the negotiations at an end.

I do not deem it necessary to comment upon the testimony at length, as the views already expressed disposes of the case. A decree will be entered dismissing the bill.

JOHN A. RINER, *Judge*.

Indorsed: No. 6448. Memorandum of decision. Filed Sept. 26, 1892. Geo. F. Sharitt, clerk.

Decree.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Plaintiffs,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcet Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

This cause having heretofore been dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard upon the bill of complaint herein, the answer thereto of the said defendant, Joab Mulvane, the replication of the
243 complainants to said answer and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties—

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed that the said complainants' bill of complaint be and the same is hereby dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainants, supersedeas bond is fixed at the sum of $1,000.00 and appeal allowed.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Decree. Filed Sept. 26th, 1892. Geo. F. Sharitt, clerk.

Know all men by these presents, that we, George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock, as surety, are held and firmly bound unto Joab Mulvane in the full and just sum of one thousand dollars to be paid to the said Joab Mulvane, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Dated this 14th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

The condition of the above obligation is such that, whereas, lately, at the adjourned June term of the United States circuit court for the district of Kansas, in the eighth circuit, in a suit depending in said court between George P. Wescott and Samuel Hanson, complainants, and Joab Mulvane, defendant, a final decree was rendered against the said complainants, and the said complainants having obtained an allowance of appeal and filed a copy thereof in the clerk's office of said court to reverse the said decree in said suit, and a citation directed to the said Joab Mulvane, citing and admonishing him to be and appear in the United States circuit court of appeals for the

eighth circuit at the city of Saint Louis, Missouri, sixty days from and after the date of said citation.

Now, if the said George P. Wescott and Samuel Hanson shall prosecute said allowance of appeal to effect, and answer all costs and damages if they fail to make good their plea, then the above
244 obligation to be void, otherwise to remain in full force and virtue.

Witness our hands the day and date above written.

GEORGE P. WESCOTT,
By CHAS. B. SMITH,
His Solicitor.
SAMUEL HANSON,
By CHAS. B. SMITH,
His Solicitor.
A. J. TULLOCK.

Approved:
JOHN A. RINER, *Judge.*

Indorsed: No. 6448. Wescott & Hanson *vs.* Joab Mulvane. Bond. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

Assignment of Errors.

In the Circuit Court of the United States for the District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, Defendants. } #6448.

The said George P. Wescott and Samuel Hanson, complainants, complain of Joab Mulvane, defendant, for that at the November, A. D. 1892, term of said court a final decree was entered in said cause dismissing the bill of said complainants. A copy of the record of said decree and proceedings in said cause is hereto attached and made a part of this assignment of errors.

And said complainants aver that there is error in said record and proceedings, in this, to wit:

I. The court erred in dissolving the temporary injunction theretofore granted against the defendant, Joab Mulvane.

II. The court erred in refusing to enter a decree in favor of said complainants and against the said defendant, Joab Mulvane, for one hundred thousand dollars, the stipulated measure of damages in case said complainants were entitled to recover.

245 III. The court erred in entering a decree in favor of said defendant, Joab Mulvane, and against said complainants.

IV. The court erred in entering a decree dismissing the bill of said complainants, as shown by said record.

ROSSINGTON, SMITH & DALLAS,
Solicitors for George P. Wescott and Samuel Hanson.

Indorsed: No. 6448. U. S. circuit court. Wescott & Hanson vs. Joab Mulvane. Assignment of errors. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Appellants,
vs.
JOAB MULVANE, Appellee.

Now come the above-named appellants, George P. Wescott and Samuel Hanson, and said appellants, conceiving themselves aggrieved by the final decree entered on the 26 day of September, 1892, at the June, 1892, term of the United States circuit court for the first division of the district of Kansas, in the above-entitled proceedings, do hereby appeal from the said final decree to the United States circuit court of appeals in the eighth circuit, and pray that these appellants' appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment and decree was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

ROSSINGTON, SMITH & DALLAS,
Solicitors for George P. Wescott and Samuel Hanson, Appellants.

And now, to wit, on this 19th day of December, 1892, at the November term of the circuit court of the United States for the district of Kansas, first division, it is ordered that an appeal be allowed in the above-entitled cause, as prayed for.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. U. S. circuit court. Wescott & Hanson vs. Joab Mulvane. Petition for appeal & allowance thereof. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

246 UNITED STATES OF AMERICA, *District of Kansas*, } ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the suit of George P. Wescott and Samuel Hanson, complainants, *vs.* Joab Mulvane and others, defendants, number 6448—excepting the testimony of Joab Mulvane on behalf of defendants therein. I further certify that the original citation is attached hereto, and made a part of this transcript.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 3rd day of January, A. D. 1893.

GEO. F. SHARITT, *Clerk.*

The United States of America to Joab Mulvane, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the first division of the judicial district of Kansas, wherein George P. Wescott and Samuel Hanson, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeals mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, judge assigned to hold the circuit court of the United States for the district of Kansas, this 19th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN A. RINER,
United States District Judge for the District of Wyoming, Assigned to Hold the Circuit Court for the District of Kansas.

Received this writ December 19th, 1892, at Topeka, Kans., and served same on the within-named defendant, Joab Mulvane,
247 by delivering to him personally a true and certified copy of this writ with all the endorsements thereon, at his usual place of business in Topeka, Kans., December 20, 1892.

R. L. WALKER,
U. S. Marshal,
By R. W. DE BOST, *Deputy.*

Fees, $2.00.

No. 6448. United States circuit court, first division of the judicial district of Kansas. Wescott and Hanson *vs.* Joab Mulvane. Citation. Filed Dec. 19th, 1892. Geo. F. Sharitt, clerk. Filed Jan. 13, 1893. John D. Jordan, clerk.

248 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing printed record, consisting of one hundred and seventy-nine (179) pages, is a full, true, and complete copy printed from the transcript of record as certified by the clerk of the circuit court of the United States for the district of Kansas in a certain cause now depending in the United States circuit court of appeals for the eighth circuit, wherein George P. Westcott and Samuel Hanson are appellants and Joab Mulvane is appellee, No. 230, May term, 1893, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the

seal of said court, at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, }
Eighth Circuit, } *ss:*

I, Walter H. Sanborn, U. S. circuit judge for the eighth
249 circuit, do hereby certify that John D. Jordan, who signed the foregoing certificate, is now the duly appointed, acting, and qualified clerk of the United States circuit court of appeals for the eighth circuit, and that the signature appended to the foregoing certificate is his genuine signature and full faith and credit should be given to all his official acts as such clerk.

Witness my hand at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

WALTER H. SANBORN,
U. S. Circuit Judge for the Eighth Circuit.

UNITED STATES OF AMERICA, }
Eighth Circuit, } *ss:*

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the Honorable Walter H. Sanborn, who signed the foregoing certificate, is a duly appointed, acting, and qualified judge of the United States circuit court of appeals for the eighth circuit; that the signature appended to said certificate is his genuine signature and that full faith and credit should be given all his official acts as such judge.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

250 Counsel for the plaintiff here offered in evidence the opinion of the United States circuit court of appeals in the case of Wescott & Hanson *vs.* Joab Mulvane, being the same opinion which was heretofore offered in evidence by plaintiff's attorney.

Counsel for the defendant objected to said opinion as incompetent, irrelevant, and immaterial.

The court sustained the objection; to which ruling of the court the plaintiff at the time duly excepted.

Here the plaintiff rested his case.

Thereupon the defendant demurred to the evidence produced on behalf of the plaintiff, and at the same time filed in the office of the

clerk of the court his written demurrer in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

Comes now the defendant in the action above entitled and demurs to the evidence produced on behalf of the plaintiff upon the ground that said evidence does not establish a cause of action in favor of plaintiff and against this defendant.

ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant."

Thereupon said demurrer was presented to the court by counsel, and, after the argument thereon, the court overruled said demurrer; to which ruling of the court the defendant excepted at the time.

MR. SMITH: If the court please, we now desire leave to amend our answer in respect to one fact, and that is simply to meet this question of attorneys' fees. We desire to state that the point was raised in the Federal court, and that under the law of the Federal courts attorneys' fees are not a proper measure of damages. I am very frank to tell the reason I do this. I want the record to show that there is a Federal question involved in this case. It will appear in the record at large, but it will more clearly appear, of course, if we put it in our answer.

THE COURT: Is not that the question the supreme court passed upon in this case?

A. (Mr. Smith). Yes, sir.

THE COURT: The amendment will be allowed.

Counsel for the defendant read to the court the proposed amendment, and the same was thereupon attached to and made a part of said answer and is in words and figures as follows, to wit:

"*Amendment to Answer.*

In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

This defendant, further answering said petition of the plaintiff as amended, says that under the law of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages
251 in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon

the law so, as aforesaid, regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same.

By reason whereof this defendant submits that the said plaintiff ought not to have and recover anything in this action for or on account of attorneys' fees as a measure of his damages in the event he is entitled to recovery herein.

ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant."

Mr. LOOMIS: Now, if the court please, we desire to amend our petition by attaching a statement covering the points as shown by the testimony and to further amend our petition by showing in detail the damages we claim.

Counsel for the defendant objected to the allowance of leave to make said amendments to the petition.

The court overruled the objection and allowed the amendments as requested.

The defendant excepted to the ruling of the court.

Thereupon there was attached to and made a part of plaintiff's petition the amendments referred to by counsel, and the same are in words and figures as follows, to wit:

"Plaintiff further alleges that he has suffered damages caused by the issuance of said restraining order and temporary injunction as follows, to wit:

1. He was prevented from collecting from Coffin & Stanton and Woodbury & Moulton on a contract entered into between him and the said parties the sum of $500,000, which was due said Mulvane on the 10 day of February, 1890; that under said contract plaintiff agreed to sell to said Coffin & Stanton and Woodbury & Moulton all of the capital stock of the Topeka Water Supply Company for the sum of $550,000; that he received $50,000 in cash upon the signing of the contract and was to receive the balance of said purchase price upon the 10th day of February, 1890, upon turning over to the purchasers the said capital stock. Plaintiff alleges that he would have been ready and able to have made the delivery of the stock and to have complied with all the terms of the contract aforesaid at the time designated if he had not been prevented by said restraining order and said temporary injunction from so doing. Plaintiff further alleges that he was unable by reason of said injunction proceedings to collect the money due him under said contract until after the temporary injunction was dissolved; that said temporary injunction was dissolved on or about April 4th, 1890, and said contract was thereafter executed. Plaintiff therefore prays judgment against defendants for interest at six per cent. per annum on said sum of $500,000, which he was prevented from collecting, as aforesaid, from February 10, 1890, until April 4, 1890, the said interest amounting to the sum of $4,500.00.

2. Plaintiff further alleges that by reason of said restraining order

and temporary injunction he was compelled to pay out large sums of money in the way of attorneys' fees to resist the allowance and obtain the dissolution of said temporary injunction, which payments of attorneys' fees were reasonable and necessary: that the names of the lawyers to whom the fees were paid, together with dates of payments and amounts of fees, are as follows: April 14, 1890, Hurd & Dunlap, $6,000.00; April 30, 1890, A. L. Williams, $3,000.00; April 17, 1890, Eugene Hagan, $3,000.00; May 24, 1890, J. D. McFarland, $4,000.00. Plaintiff therefore prays for judgment against defendants for the amounts so, as aforesaid, paid out by him for reasonable and necessary attorneys' fees, together with interest upon each of said
252 payments at the rate of six per cent. per annum from the date of payment to date of verdict.

3. Plaintiff further alleges that by reason of said restraining order and temporary injunction he was compelled to pay out other sums of money as follows, to wit: April 6, 1890, expenses of Joab Mulvane and attorneys on trip to Little Rock to present motion to dissolve temporary injunction to Judge Caldwell, $128.68; March 31st, expenses of Attorney A. L. Williams on trip to Little Rock for same purpose, $75.00; March 11, 1890, expenses of Attorney Eugene Hagan to Little Rock to arrange with Judge Caldwell for a date to take up motions to dissolve injunction, $50.00; March 11, 1890, paid Geo. F. Sharitt, clerk U. S. circuit court, district of Kansas, costs caused by said injuction proceedings, $20.00; Feb. 15, 1890, paid same person for same purpose, $34.55; April 11, 1890, paid same person for same purpose, $37.25; Feb. 24, 1890, paid C. V. Safford, stenographer, for services rendered in preparing legal papers required in the defense of said injunction proceedings, $6.00; April 26, 1890, paid for telegrams relating to the defense of said injunction proceedings, $70.00; Feb. 7, 1890, paid expenses of D. W. Mulvane to New York, $240.00. D. W. Mulvane was sent to New York to confer with Coffin & Stanton and Woodbury & Moulton and to persuade them not to declare their contract forfeited by reason of Joab Mulvane's inability to carry out the contract on February 10, 1890, which inability was caused solely by reason of said restraining order and injunction proceedings. March 1, 1890, paid expenses of another trip of D. W. Mulvane, after temporary injunction was granted, for same purpose, $208.00. Plaintiff therefore prays judgment for said payments and each of them and for interest thereon from date of payment to date of verdict at the rate of six per cent. per annum. Plaintiff prays for judgment against defendants in the aggregate sum of $75,000 and costs of this suit.

A. L. WILLIAMS AND
N. H. LOOMIS,
Attorney for Plaintiff."

Thereupon counsel for the defendant asked the court to postpone the trial of this case because of the allowance of the said amendments to plaintiff's petition. The court denied the request; to which refusal of the court the defendant excepted at the time.

Thereupon the defendant, to maintain the issues upon his p produced and offered in evidence as follows:

A. H. VANCE, called as a witness on behalf of the defendant, be first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HISTED:

Q. Please state your name.
A. A. H. Vance.
Q. What is your occupation?
A. Lawyer.
Q. Where are you engaged in practice?
A. Topeka.
Q. How long have you been engaged in the profession here?
A. About twenty-eight years.
Q. Judge Vance, suppose that on the 5th day of February, 18 George P. Wescott and Samuel Hanson filed a bill in equity in t United States circuit court against Joab Mulvane, the Topeka Wa Supply Company, the Topeka Water Company, and Coffin & Stant of New York, wherein the said Wescott & Hanson claimed to ha entered into a contract with Joab Mulvane, the owner of the capi stock of the Topeka Water Supply Company, par value four hu dred thousand dollars, for the purchase of the same at the agre price of five hundred thousand dollars. It was alleged in t bill that Mulvane had refused to comply with his contract a deliver the stock and had made sale of the same to Coffin Stanton, of New York city, at an advance of fifty thousa dollars; that it was proposed by Mulvane and Coffin & Stant to form a new corporation called the Topeka Water Compan which should become the owner of this plant, and th
253 Mulvane was about transferring the stock of the supp company and carrying out an agreement with referen to the formation of the new company. The complainants in t suit asked for specific performance of the contract with Mulva and for an order enjoining him from completing the contract wi Coffin & Stanton and enjoining the water companies and Coffin Stanton from further carrying out the contract with Mulvane. Up the filing of the bill the United States circuit court awarded a te porary restraining order restraining Mulvane and the water co panies from putting upon the record any deed of conveyance mortgage or from signing, sealing, or negotiating any bonds of t water company and enjoining Mulvane from transferring the sto of the supply company and Coffin & Stanton from negotiating t bonds of the water company or taking any further steps towar perfecting their contract of purchase with Mulvane. The court s the application for a temporary injunction on February 12th, an notice of the restraining order and time fixed for hearing the appl cation for temporary injunction was served upon Mulvane and t water companies. The application for a temporary injunction can

on for hearing before Judge Foster on February 12th, at which time all of the defendants appeared and resisted the same. At this hearing they were represented by the same counsel and presented the same defense. The court upon the hearing awarded a temporary injunction upon the complainants giving bond to the extent of seventy-five thousand dollars. The defendants afterwards filed separate motions to dissolve this injunction and noticed the same for hearing before Judge Caldwell, circuit judge, at Little Rock, on April third. On the fourth day of April the motion of Coffin & Stanton to dissolve the injunction was heard by Judge Caldwell, who at the time made an order in the case as follows:

"And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and also come Joab Mulvane, the Topeka Water Supply Company, and the Topeka Water Company, by A. L. Williams, J. D. McFarland, Eugene Hagan, and A. A. Hurd, their attorneys, and also come Coffin & Stanton, by Silas B. Jones and J. D. McFarland, their attorneys; and the motion of Coffin & Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensible party defendant and the plaintiffs being citizens of the same State, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject, it is therefore ordered, considered, and adjudged that the temporary injunction granted in this cause by the circuit court on the thirteenth day of February, 1890, be, and the same is hereby, dissolved."

It appeared that Woodbury & Moulton, of Maine, were parties in this contract in association with Coffin & Stanton, of New York, and that Woodbury & Moulton and Coffin & Stanton were jointly interested in said contract with Mulvane, and which was in writing. The complainants in the suit were likewise citizens of Maine. The merits of the controversy were not considered by Judge Caldwell, but he distinctly refused to consider the same and, as shown by the foregoing order, dissolved the injunction upon the sole ground of want of jurisdiction. These same attorneys who appeared in the injunction branch of the suit also had charge of the defense
254 generally and prepared and filed various pleas and answers for the various defendants in the case. What, in your opinion, under the facts and circumstances hereinbefore set forth, was a reasonable compensation for attorneys' fees in and about the injunction branch of the case, having in mind the ground apparent from the contract of Mulvane and Coffin & Stanton and the record known to the attorneys at the time with reference to the diverse citizenship of the parties and its effect upon the jurisdiction of the court?

Counsel for the plaintiff objected to the question as incompetent, irrelevant, immaterial, and not based upon facts proven in the case.

The court overruled the objection; to which ruling of the court the plaintiff at the time duly excepted.

A. Three thousand dollars.

Q. That is, with reference to the injunction branch of the case and for all of the services?

A. Of all the attorneys.

Q. And for all the attorneys for all the defendants?

A. Yes, sir.

Q. What would you say, from the facts and circumstances I have already called to your attention, would be a reasonable compensation for attorneys' fees for appearing before Judge Caldwell at Little Rock and obtaining a dissolution of the temporary injunction alone?

Counsel for the plaintiff objected to the question as incompetent, irrelevant, immaterial, and not based upon facts proven in the case. The court overruled the objection; to which ruling of the court the plaintiff at the time duly excepted.

A. Do you mean attorneys for all the parties?

Q. Yes, sir; attorneys for all the parties appearing before Judge Caldwell and obtaining a dissolution; just that part of the injunction.

A. Two thousand dollars.

Cross-examination.

Questions by Mr. Loomis:

Q. You are not a very high-priced attorney, are you, Mr. Vance?

A. I don't know whether you think so or not.

Q. What do you think about it?

A. I try to be reasonable and fair.

Q. Is there any fixed and determined rule by which to get at the value of attorneys' services—the amount attorneys should charge?

A. None absolutely fixed, but they should take into consideration all the circumstances surrounding the case and the amount involved.

Q. What do you usually take into consideration when you make a charge for fees?

A. The character of the case and the amount involved.

Q. Is that all?

A. Yes, sir; practically all.

Q. Do you take into consideration the questions in the case?

A. Certainly. When I say the character of the case that is included.

Q. Do you take into consideration the results, whether you are beaten or whether you win?

A. Yes, sir.

Q. Do you charge a higher fee when you win than lose?

A. Yes, sir.

Q. Do you take into consideration the financial condition of the party you represent?

A. Yes, sir.

Q. If a man is wealthy, do you charge him more for the same services than you would if he was poor?

A. Not just stated in that way, and yet that enters into it.

Q. That is an element, is it?

A. Yes, sir.

Q. Suppose one party is a widow and the other a capitalist and you perform the same service for both, would you make any difference in your charge?

A. Yes, sir; not because there is any difference in the value, but because there is a difference in the condition of the party.

Q. Suppose the result or decision was going to be very det-
255 rimental to your client, break him up in business, and in another case involving the same facts and same work, and so on, it would be of trivial consequence to your client, would that make any difference in your charge?

A. Make a very material difference.

Q. If you were able to save your client from bankruptcy in a case involving an amount aggregating, say, half a million dollars, you would feel like charging a big fee, wouldn't you?

A. Yes, sir; I would. I think it would be worth it.

Q. Suppose in a case involving half a million dollars there is an injunction hanging over your client which he is bound to get rid of and if he cannot get rid of it in a very short time he will be unable to meet his obligations and will go into bankruptcy and you succeed in getting rid of the injunction and permitting him to carry out his contract and save himself from misfortune, would you think three thousand dollars a sufficient fee?

A. It would depend entirely upon the reason it was dissolved.

Q. Would it make any difference why it was dissolved?

A. Yes, sir.

Q. Suppose it was a question of jurisdiction, pure and simple. You raise the question in the circuit court before one judge and he ruled against you and you fought it as hard as you could and were compelled to go to another circuit judge of similar jurisdiction for the purpose of having the injunction dissolved, what would your charge be in a case of that kind?

A. It wouldn't make any difference. There would be two trials—would make a difference—two tests would make a difference. This is the proposition that I gave my judgment upon in this case, as I understand it. If I succeeded in obtaining favorable results that were very valuable to a client, but was the result of gaining the decision of the court my way upon an open question, it would be much more valuable than where a fact is developed in the course of the investigation that disposed of the jurisdiction of the court, irrespective of my ability *of* anybody'- else ability, and the case must be disposed of on that question of jurisdiction, because it is a fact that disposed of it and not any legal question that is argued, and therefore the value of the services is not the same at all; and if by great research and skill in combatting equal research and skill upon the other side the court has been persuaded that your view is correct, and therefore you get a decision, than, where the decision went off

because the fact decides it, whether the court or lawyers or anybody else wants it that way, that is the difference, in my judgment, in the value of the services.

Q. Suppose in the case I put to you, Mr. Vance, the attorneys had made a great deal of research upon three or four difficult questions, upon the question of jurisdiction as well, and the question of jurisdiction had been upon the construction of a contract and upon facts for the purpose of determining whether parties were indispensable parties, what would you think about fees under those circumstances?

A. It would make a material difference if it was disposed of on that proposition.

Q. If you had made your research and thought on these other propositions and it was disposed of on that, you think you would not be entitled to anything for your other work?

A. Not at all. It would make very great difference in the value of the services in this, that you had not succeeded upon the proposition that you advanced at all, but there is a fact develops that disposes of the case, because the court has not jurisdiction regardless of the merits of it and will dispose of it irrespective of what you
256 do—in other words, it is not the skill nor the ability of the lawyer that accomplished the result; that is what I mean, and that is what makes a very material difference, in my view, of the value of the services.

Q. When the trial court grants a temporary injunction after full argument and consideration, state whether or not it is ordinarily a pretty difficult thing to get that injunction dissolved.

A. Yes, sir; I think it is, especially upon a full hearing.

Q. Are you familiar with practice in Federal courts?

A. To some extent; not nearly as much as a great many attorneys.

Q. When one judge has jurisdiction of a case and is acting upon it and considering it and ruling upon the different phases of the case, I want you to state whether or not it is a difficult matter to get another Federal judge of equal jurisdiction to act upon phases of that case.

A. I think it is.

Q. Very difficult matter to do, isn't it?

A. Yes, sir.

Q. And if Judge Foster should grant a temporary injunction in a case after full consideration and argument, don't you think it would be quite a gigantic task to undertake to go to Little Rock and persuade Judge Caldwell to set it aside and dissolve the injunction?

A. Yes, sir; upon the merits of the case, I think so.

Q. Well, dissolve that temporary injunction upon a motion filed to dissolve it after the temporary injunction had been granted by Judge Foster?

A. When, as I understand it, the opinion rendered by——

Q. I am not referring now to this case. Take cases generally.

A. Generally, I say yes, without any hesitation.

Q. It is a very difficult matter to accomplish?

A. Yes, sir; generally, I say yes, without any hesitation. In almost every case he wouldn't hear it at all.

Q. Take a sharply contested case upon a promissory note involving five hundred dollars, brought in the district court, what, in your judgment, would be a reasonable attorneys' fee, supposing you got your judgment?

A. Fifty dollars would be a reasonable attorneys' fee.

Q. Suppose the promissory note involved five thousand dollars and there was a sharp contest and a possibility of being defeated on it and you finally succeeded in getting judgment.

A. Five hundred dollars would be a reasonable attorneys' fee.

Q. How do you get at that amount?

A. I get at the amount involved and the difficulty, as you suggest, in obtaining the judgment.

Q. You have taken about ten per cent. of the amount involved, haven't you?

A. Yes, sir; that is what I have.

Q. Now, suppose the promissory note was fifty thousand dollars and there was a good, hard contest and you succeeded in getting your judgment, what would you think would be a reasonable attorneys' fee?

A. It would be according to the questions that were involved. It would run from two to five thousand dollars.

Q. Five thousand dollars would be ten per cent.?

A. Yes, sir.

Q. From five to ten per cent.?

A. Yes, sir.

Q. Are you getting at these fees on a percentage basis?

A. Yes, sir.

Q. Suppose the amount, then, was a hundred thousand dollars, and a good, sharp contest and you succeeded in getting your judgment, what would be a reasonable attorneys' fee?

A. It would run in proportion the same way, increase of fees.

Q. From five to ten per cent.?

A. Yes, sir; the amount would increase the fees all the time.

Q. You usually get, then, at the reasonable value of attorneys' fees in a sharply contested case by taking from five to ten per
257 cent. of the amount involved?

A. Yes, sir; where it is a collection of that kind you speak of on a bond or note.

Q. Is it at all extraordinary in a case involving ten thousand dollars—say a man's farm worth ten thousand dollars—to have several different firms engaged in the case on one side or the other?

A. Yes, sir; I think it is—several.

Q. Three firms?

A. Yes, sir.

Q. You think it is an extraordinary fact?

A. Yes, sir.

Q. Suppose the amount involved was fifty thousand dollars. Have you participated in cases of that amount?

A. Very rarely. I have had one. I had one at one time larger than that.

Q. Is it very extraordinary for several attorneys to appear on one side of a case involving fifty thousand dollars?

A. No, sir; I don't know that it is.

Q. Is it not customary for more than one attorney to appear in all cases of any importance at all?

A. Yes, sir; it is.

Q. A difficult matter for one man to take charge of a case of any importance?

A. Yes, sir; most always more than one in an important case.

Q. Now, then, when an attorney charges a fee, Mr. Vance, is it not very difficult for his client to get rid of paying it if it is at all within reason?

A. Yes, sir.

Q. If he don't pay it, he has an opportunity of having another lawsuit on his hands?

A. Yes, sir.

Q. When a man makes a contract calling for property—for the sale of property worth five hundred and fifty thousand dollars—and he is unable to comply with his contract and turn that property over in accordance with his contract, is he not ordinarily liable to a great big suit for damages?

A. I presume he is; yes, sir.

Q. How high might a suit for damages be brought in a case of that kind?

A. According to whatever damages might be suffered.

Q. Might it not be brought for a sum as high as three or four hundred thousand dollars?

A. Yes, sir.

Q. And in a damage suit of that kind a man would be compelled to pay out pretty good attorneys' fees to defend him?

A. Yes, sir.

Q. Especially if there was a good case against him for damages?

A. Yes, sir.

Q. When a person seeks the specific performance of a contract and gets judgment or a decree enforcing that contract what recourse has the party against him? The decree is obtained for the purpose of collecting the money which is due him upon that decree, provided the person who gets it is not willing to do it voluntarily.

A. I don't know whether I understand that or not.

Q. Suppose you sue me for the specific performance of a contract and want to compel me to deliver to you a farm, and the farm is worth ten thousand dollars, and you say you are willing to pay the ten thousand dollars, and you get judgment against me for the specific performance of the contract, and then I am willing to perform and then you are unwilling to pay, what recourse would I have against you to get the money?

A. You don't have to perform. The performance of the contract—the decree of that kind decrees both sides of the contract, and you

are protected just the same way under that decree as you were in the contract you made.

Q. Suppose when you got a decree, the court is willing to render you judgment, you say, "I haven't got the money; I did have the money, but it is gone." What recourse would I have against you?

A. I cannot conceive a decree that would compel you to convey. If I can't pay the money, you wouldn't have to convey; you
258 wouldn't have any redress.

Q. I wouldn't be compelled to convey, but suppose after you got judgment against me I was then willing to convey and tendered it to you and you said, I haven't got the money. You are not compelled to put up a bond when you bring suit for specific performance, are you?

A. Certainly not.

Q. Conditioned that you will comply with the decree of the court?

A. Certainly not.

Q. If you haven't got the money and can't pay me, what recourse have I got against you?

A. Haven't got any. I never heard of such a thing as that.

Q. It could possibly occur, couldn't it?

A. I don't see how it could be possible.

Q. Because a man brings a suit to require specific performance of a contract, is that any assurance that he has the money to comply with the terms of the decree?

A. In the trial of that kind of a case when the court makes a decree of specific performance of a contract it protects both parties, and in the performance of that decree the contract will be carried out upon both sides, and if any money was to be paid, before your rights are disturbed at all by any act you do under that decree, you will be protected by the money being paid; otherwise you will stand as you originally did.

(Witness excused.)

F. D. FULLER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HISTED:

Q. State your name and residence.

A. F. D. Fuller; Topeka.

Q. What is your occupation?

A. Attorney.

Q. Practicing law here in Topeka?

A. Yes, sir.

Q. How long have you been engaged in the practice here in Topeka?

A. Since 1889.

Q. You heard this long question I read?

A. Yes, sir.

Q. I want to ask you the same question based upon that hypo-

thetical proposition. What, in your opinion, under all the facts and circumstances set forth in that, would be a reasonable compensation for all of the attorneys for all the defendants in the case in the injunction branch of it, bearing in mind the ground and various points affecting the jurisdiction of the court?

A. I should say five thousand dollars would be a very fair fee.

Q. For all the attorneys for all the defendants?

A. In the injunction proceedings; yes, sir.

Q. And with reference to all the injunction proceedings?

A. Yes, sir.

Q. What, in your opinion, under the same facts and circumstances, would be a reasonable and fair compensation for attorneys in going to Little Rock and procuring a dissolution of that temporary injunction before Judge Caldwell?

A. I should think for that phase of it three thousand dollars.

Q. Do you mean by that for all the attorneys?

A. Yes, sir.

Q. For all the defendants?

A. Yes, sir.

Cross-examination.

Questions by Mr. LOOMIS:

Q. In a case like the one first propounded to you, what, in your judgment, would be a reasonable attorneys' fee for the attorneys representing Mr. Mulvane exclusively?

A. I can hardly get from my mind the association that has been brought into it by the testimony in the case—that is, by the questions you proposed and by what Mr. Histed has. With that explanation I would say the same fee would apply to Mr. Mulvane, that he seemed to have control of the whole thing.

Q. Did you hear the question I propounded?

259 A. Not that question. I mean since that.

Q. You mean the questions propounded to Mr. Vance?

A. No, sir; to Mr. McFarland and Mr. Hagan.

Q. You would think that how much would be a reasonable charge to make for services performed for Mr. Mulvane exclusively?

A. As I understand the statements made and all I listened to is that Mr. Mulvane's case was the case of all parties, and therefore I say the same amount.

Q. And for the services at Little Rock, how much should Mr. Mulvane's attorneys charge for that?

A. With the same explanation, I would say the same amount, three thousand dollars.

Q. Have you ever been connected with a case involving half a million dollars?

A. Not quite that; no, sir.

Q. In a suit involving five thousand dollars, sharply contested, if you were successful, what would be a reasonable attorneys' fee?

A. That would depend upon the party I was working for.

Q. What difference would that make?

A. If I had been attorney for a man in a good many cases and he had given me a good deal of litigation, that would modify it some.

Q. If he were a new client and you want to keep him, would that affect the amount?

A. No; I would make a fair charge.

Q. Would you take into consideration the financial standing of the party you were making the charge against?

A. That would be something; yes, sir.

Q. Would you charge more for the same services for a capitalist than for a widow?

A. I certainly would if the widow had a hard time to get along and depended on what she got from that case for support.

Q. Does it make any difference as to the standing of attorneys employed in a case?

A. Quite a difference; yes, sir.

Q. Can an attorney of established reputation and long experience charge more for a given service than any inexperienced attorney?

A. He can charge more.

Q. Is it customary?

A. I think it is; my experience has been that it is.

Q. As a general thing, I wish you would state whether or not it is a difficult thing, after an injunction has been granted by a trial court, to obtain its dissolution?

A. It is; yes, sir; by that same court.

Q. When an injunction is granted and bond given, how long is the injunction good?

A. It depends upon the term of the injunction order.

Q. Don't it ordinarily continue until the merits of the case are disposed of?

A. Yes, sir.

Q. An equity case or chancery case in the Federal court is apt to hang on a long time?

A. Yes, sir.

Q. And where a temporary injunction is granted in a case of that kind it is apt to tie a man up for that time?

A. Yes, sir; that case, that particular case.

Q. And in the Federal court or in any other court, for that matter, when a judge is acting upon a matter—has a case under charge or consideration—is it a very difficult thing to get another judge of equal jurisdiction to take the case up and pass upon it?

A. I think so, usually.

Q. Take a case where Judge Foster granted a temporary injunction in Topeka after full consideration, is it not quite a big undertaking to get Judge Caldwell, at Little Rock, to act upon the same matter and dissolve the injunction?

260 A. Not with Judge Caldwell. My opinion of him is he don't have a very great opinion for any of the judges except as ordinary people.

Q. He has always been willing to act for you, notwithstanding any other judge has acted?

A. Yes, sir; that is the case.

Q. Do you mean matters that have been already passed upon by Judge Foster?

A. In probably one case; yes, sir. I heard him come in and sail into Judge Foster with a considerable amount of—I don't know how to term it.

Q. And overrule him in a matter?

A. Yes, sir.

Q. Weren't you surprised at his taking that action?

A. I was surprised. That was my first experience with Judge Caldwell. I learned afterwards he was rather inclined to be rough.

Q. Being rough is one thing and having jurisdiction of a case that another court has jurisdiction of is another.

A. I expect he thinks this way: He is circuit judge and Foster simply sits as judge.

Q. I want to read my hypothetical question, Mr. Fuller, and get your answer to it.

261 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of facts: Upon December 14, 1899, Wescott & Hanson entered into an agreement with Joab Mulvane whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty-thousand-dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about

thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
262 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration, Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys, before Judge Foster, to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant, A. L. Williams, lawyer of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell at Little Rock and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost, because one of them was a citizen of the same State as one of the complainants. The complainants, Wescott & Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company

stock; they were not to invest a dollar of their own money in the deal; and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott & Hanson represented refused to make the sixty-thousand-dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane, in pursuance of such employment, appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved, Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the professional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorneys' fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

A. I want to ask one question. In your question do you
263 state that the delay in having the contract tied up would involve the solvency of Mr. Mulvane or bankruptcy?

Q. Yes, sir; if it had been tied up for any length of time or if it had been continued to the next term of court.

A. It would have caused him to go into insolvency?

Q. Let me read you that part again: "When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations," etc. Do you call it to mind?

A. On that statement of facts I should say that ten or twelve thousand dollars, possibly a little more than that, would be a fair fee in the case. Some might charge fifteen thousand dollars. That would be a good fee, a large fee.

Q. Would that be a good fee, taking into consideration the standing of the attorneys and all the facts stated in this question?

A. I think that would be a large fee—fifteen thousand dollars—but I think ten to twelve thousand dollars would be a fair fee.

(Witness excused.)

It is now admitted, in open court, by and between the parties to this action that within the time allowed, as shown by the printed record which has been introduced, complainants Wescott & Hanson prosecuted an appeal from the decision of the United States circuit

court to the United States circuit court of appeals and gave the bond that is required in the order and otherwise perfected their appeal, and that the case was pending on appeal in the United States circuit court of appeals at the time of the commencement of this suit on the injunction bond and remained pending there for some time after, when it was decided.

Here the defendant rested his case.

Thereupon the plaintiff, to further maintain the issues upon his part, produced and offered evidence in rebuttal as follows:

Counsel for the plaintiff again brought to the attention of the court and offered in evidence the opinion of the United States circuit court of appeals in the case of Wescott & Hanson *vs.* Mulvane.

Counsel for the defendant objected to said opinion as incompetent, irrelevant, and immaterial, because the same was rendered long subsequent to the commencement of this action and because it forms no part of the record in said case.

The COURT: I have been thinking over this matter considerably since the offer of this opinion was first made and have concluded to admit it in evidence. The objection will therefore be overruled.

The defendant excepted to the ruling of the court.

Said opinion was read to the court and jury and is in words and figures as follows, to wit:

(Circuit Court of Appeals, Eighth Circuit, October 16, 1893.)

WESCOTT ET AL. *vs.* MULVANE. } No. 230.

1. Specific performance—Tender by complainant.—An agreement to sell the whole capital stock of a corporation, the first payment to be made in cash on the subsequent signing of a mere formal contract, there being no stipulation as to time of delivering the stock, is not specifically enforceable when the purchaser has failed to tender the first payment as agreed, demanding that the stock should be first deposited in a bank.
2. Same—Injunction—Dissolution.—Where under a bill for specific performance of a contract of sale complainant after securing a temporary injunction against a sale to other parties withdraws "so much of the bill as seeks specific performance," with the understanding that if the court finds him entitled to specific performance it shall award damages in lieu thereof, it is then proper to dissolve the injunction, since it could only be awarded as incident to the relief originally sought.

Appeal from the circuit court of the United States for the district of Kansas. In equity.

Suit by George P. Wescott and Samuel Hanson against
264 Joab Mulvane for specific performance of a contract. The court below dismissed the bill and complainants appeal. Affirmed.

W. H. Rossington and Charles Blood Smith (E. J. Dallas, on the brief), for appellants; A. L. Williams, for appellee.

Before Sanborn, circuit judge, and Thayer, district judge.

THAYER, *District Judge:*

This was originally a bill filed by the appellants against the appellee to specifically enforce the following contract:

"BOSTON, *December 14th*, 1889.

"GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of par value of one hundred dollars per share, for the sum of five hundred thousand dollars ($5,000,000.00) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000.00) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000.00), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000.00) to be paid February tenth, 1890, one hundred and forty thousand dollars (140,000.00) to be paid February twentieth, 1890, and one hundred thousand dollars (100,000.00) to be paid March twentieth, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February twentieth, 1890, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America in the city of Boston, Mass.

"JOAB MULVANE.

"To George P. Wescott, Samuel Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

"GEO. P. WESCOTT.
"SAMUEL HANSON."

Other persons and corporations besides the appellee were at first made parties defendant, with whom, as the bill charged, the appellee had entered into negotiations after the execution of the foregoing contract with a view of forming a new corporation, known as the Topeka Water Company, and transferring to it the property and franchises of the Topeka Water Supply Company and capitalizing such new corporation at a sum largely in excess of the sum which the appellants had agreed to pay for the stock of the Topeka Water Supply Company. A preliminary injunction against all of said original defendants was prayed for and obtained on the filing of the bill, restraining them, in substance, from carrying out the negotiations aforesaid, and from putting on the market any of the securities of the new corporation, and from canceling the stock of the Topeka Water Supply Company, and from transferring its franchises and property to the new company. A motion to dissolve that injunc-

tion was subsequently made, and on a hearing of the same it was sustained, and the injunction was thereupon dissolved. Afterwards a stipulation was made and filed in the case, whereby the bill was dismissed as to all of the defendants except the appellee. This stipulation contained, among other things, the following clauses:

"(2.) Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane described in said bill of complaint."

"(4.) Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance."

"(5.) Nothing contained in this stipulation shall enlarge or lessen or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action except as contained in paragraph two hereof."

The bill appears to have been thereafter retained by consent of all parties, with the understanding that the case should be tried and that damages should be assessed by the court in lieu of
265 a decree of specific performance as for a breach of said contract if the court was of the opinion that the appellants were originally entitled to specific performance. Considerable testimony was thereupon taken, and on final hearing the circuit — dismissed the complaint. We shall indulge in no criticism of the regularity or propriety of the foregoing proceedings. The case having been argued in this court upon the evident assumption that the parties had a right to thus turn a proceeding in equity into a suit at law, and to make the damages dependant upon the question whether there was an original right to specific performance, we shall proceed to consider and treat the case upon that theory, the question being whether, in view of all the circumstances attending the making and execution of the agreement, it was one which a court of equity would specifically enforce. The contract was executed in the city of Boston, late in the evening of Saturday, December 14, 1889, but there had been some preliminary negotiations between the parties at Topeka, Kansas, on the 12th of the preceeding November. The appellants resided respectively at Portland, Me., and Boston, Mass., while the appellee resided at Topeka, and was the chief executive officer and a large shareholder in the Topeka Water Supply Company. The testimony shows that the parties had met by appointment in the city of Boston on the day the contract bears date, and that they had had a lengthy conference before it was finally signed. In the course of that interview the defendant informed the complainants that he had not as yet succeeded in obtaining control of certain shares of stock of the Topeka Water Supply Company, of the par value of twelve thousand dollars; that the residue of the stock was within his control, but that he only had shares of the par value of forty thousand dollars with him; that he must have sixty thousand dollars cash in hand on signing the contract, and that a Mr. Burr, who was president of a Boston bank, would probably be willing to guaranty that the payment of the sixty thousand dollars would be a safe thing to do under these circumstances. With this

information the contract above set out was drawn and signed and the parties separated to meet on the following Monday, December 16, 1889. When the parties met on the succeeding Monday the appellants submitted a form of contract to be signed by the appellee in pursuance of the stipulation in the preliminary contract above set out, which provided that sixty thousand dollars should be paid to the defendant on the signing of the same, but which also contained a provision that the defendant should "at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company." They further informed the defendant that the Mr. Burr referred to had refused to give the above-mentioned guaranty, although he had given him "a high recommendation for integrity and financial ability." Thereupon a long controversy appears to have ensued, in which the complainants undoubtedly took the ground that they ought not to pay the sixty thousand dollars unless the entire stock of the water supply company was first deposited in the National Bank of North America, while the defendant contended that that was an evasion of the terms of the provisional agreement of December 14, 1889, and that the sixty thousand dollars should be forthwith paid, and that the complainants should trust to his ability to make good his promise to deliver the stock. Not being able to come to an understanding, the parties separated and the negotiations came to an end. It is perfectly obvious, we think, from an inspection of this record, that the complainants at no time tendered to the defendant the sum of sixty thousand dollars at the National Bank of North America, in the
266 city of Boston or elsewhere, or ever professed a willingness to pay him that sum until he had deposited the entire capital stock of the water supply company in the Boston bank aforesaid, which deposit of stock, as the complainants well knew, the defendant was not prepared to make. Under these circumstances we must conclude, as the circuit court appears to have done, that the complainants were not entitled to a specific performance of the contract, for the reason that they had never placed the defendant in default by tendering to him the sum which he was entitled to receive before the delivery of any stock. The fact seems to be that the contract of December 14, 1889, was intended as a brief statement of the more important stipulations that were to be embraced in a contract to be subsequently drawn which should cover all the details of the transaction, but when this subsequent contract was drawn and presented it was found that it did not express the intentions of one of the parties at least as to the matter of the delivery of the stock, concerning which nothing had been said in the original agreement except by implication. We are not disposed, however, to question the proposition that the contract counted upon in the bill is a complete contract, nor the further proposition that such an agreement may be specifically enforced. For present purposes both of these propositions may be conceded; but, conceded them to be well founded, we are nevertheless of the opinion that the agreement called for the

payment of sixty thousand dollars before the defendant could be required to deliver any stock, and as no money was tendered he is not shown to have been at any time in default. It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think — is all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn the injunction necessarily shared the same fate. Finding that — no error in the record, the decree of the circuit court is in all things affirmed.

Mr. Loomis: If the court please, we now renew our offer in evidence of the mandate of the United States circuit court of appeals in the case of Wescott and Hanson *vs.* Mulvane, which shows the precise time of the order of that court.

Counsel for the defendant objected to said mandate as incompetent, irrelevant and immaterial, and because the same occurred long subsequent to the commencement of this action. The court overruled the objection; to which ruling of the court the defendant at the time excepted and still excepts.

Thereupon said mandate was read by counsel for the plaintiff to the court and jury, and the same is in words and figures as follows, to wit:

"United States of America, *ss.*:

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Whereas lately, in the circuit court of the United States for the district of Kansas, before you or some of you, in a cause between George P. Wescott and Samuel Hanson, complainants, and Joab Mulvane, defendant, wherein the decree of the said court entered in said cause on the 26th day of September, A. D. 1892, is in the following words, viz:

"This cause having heretofore been dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard, upon the bill of complaint herein, the
267 answer thereto of the said defendant, Joab Mulvane, the replication of the complainants to said answer, and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed that the said complainants' bill of complaint be, and the same is hereby, dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainant, supersedeas bond is fixed at the sum of one thousand dollars and appeal allowed,' as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, eighth circuit, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of May, in the year of our Lord one thousand eight hundred and ninety-three, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel;

On consideration whereof it is here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that Joab Mulvane recover against George P. Wescott and Samuel Hanson the sum of twenty dollars for his costs herein, and have execution therefor, October 16, 1893;

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of December, in the year of our Lord one thousand eight hundred and ninety-three.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit."

Here the plaintiff rested his case and here the defendant rested his case.

The hour of adjournment arrived, and the further trial of this case was postponed until tomorrow morning at nine o'clock, the jury being duly admonished by the court, as required by law, as to their conduct during the adjournment until tomorrow morning, at which time court met pursuant to adjournment, and the trial proceeded.

Thereupon, the evidence being closed, counsel for the plaintiff presented to the court in writing certain instructions and asked the court to give the same to the jury.

Said instructions are in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.
A. J. TULLOCK, Defendant.)

The court is respectfully requested by the plaintiff to give the following instructions to the jury.

A. L. WILLIAMS,
N. H. LOOMIS,
Attorneys for Plaintiff."

I. This is a suit brought by the plaintiff, Joab Mulvane, against the defendants, A. J. Tullock and W. M. D. Lee, upon an injunction bond signed by the defendants, for the recovery of $75,000.00 damages. It appears from the pleadings and the undisputed testimony in the case that upon the 5th day of April, 1890, Geo. P. Wescott and Samuel Hanson brought an action against Joab Mulvane and others in the circuit court of the United States, district of Kansas, to enjoin the execution of a certain contract entered into between said Mulvane and Coffin & Stanton and Woodbury & Moulton, by the terms of which contract Mulvane agreed to sell to Coffin & Stanton and Woodbury & Moulton all of the capital stock of the Topeka Water Company for the sum of $550,000.00; that upon the filing of the bill of complaint in said cause a restraining order was issued by the court restraining and enjoining said Mulvane from carrying out said contract with Coffin & Stanton and Woodbury & Moulton
268 pending the hearing upon the application for a temporary injunction, which was set for argument upon February 12, 1890. It further appears from the pleadings and the undisputed testimony in the case that the temporary injunction was afterwards granted, enjoining the carrying out of said contract between Mulvane and Coffin & Stanton and Woodbury & Moulton until the final hearing in the case, and that upon the granting of this injunction the court ordered that a bond in the sum of $75,000.00 be given by the complainants Wescott & Hanson for the protection of the defendants, against whom the injunction was issued. An order was afterwards made by the court permitting $75,000.00 in cash to be substituted in lieu of a bond. Afterwards the court permitted the cash to be withdrawn and a bond substituted in its place. It is upon this bond that the present suit was brought by Mulvane against Tullock and Lee. It further appears that from the pleadings and the undisputed testimony in the case that said temporary injunction was afterwards and upon the 14th day of April, 1894, dissolved, and that upon the — day of October, 1894, a stipulation was entered into whereby so much of plaintiffs' bill in said case of Wescott & Hanson *vs.* Mulvane *et al.* as sought a specific performance of the contract therein set forth between the complainants and Joab Mulvane was withdrawn, and *and* the said case was thereupon proceeded with as an ordinary suit for damages. The injunction bond upon which this suit is based was conditioned for the payment to the defendants in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, above mentioned, and to each of them, all damages which they or either of them had already sustained at the time said bond was given, or might at any time sustain by reason of the granting or issuing of the restraining order above referred to, or the granting and issuing of said temporary injunction, if it should be finally decided that said restraining order or said injunction ought not to have been granted. No service of process has been made in this case against the defendant W. M. D. Lee, and plaintiffs are proceeding, as they have a right to, against the defendant A. J. Tullock alone.

II. The jury are instructed that the action of the United States circuit court for the district of Kansas in dissolving the temporary

injunction in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, above referred to, was made final by the voluntary withdrawal by complainants in that case, on the 17th day of October, 1890, of so much of their bill as sought a specific performance of the alleged contract, and that thereafter the said Joab Mulvane had the right to maintain a suit upon said injunction bond to recover whatever damages he might be entitled to thereunder.

III. The jury are instructed that the only question for them to determine in this case is as to the amount of damages which the plaintiff is entitled to recover against the defendant A. J. Tullock.

IV. The jury are instructed that the plaintiff Joab Mulvane is entitled to a verdict against the defendant A. J. Tullock for all damages which he has sustained by reason of the granting or issuing of said restraining order in the case of Wescott & Hanson *vs.* Joab Mulvane *et al.*, above referred to, and the granting and issuing of said temporary injunction; which damages would include the following items:

1. All reasonable and necessary fees of attorneys employed by the said Joab Mulvane for services performed in his behalf in defending against and procuring the dissolution of the injunction in said case.

2. All reasonable and necessary expenses not included in the item of attorneys' fees incurred by the said Joab Mulvane in defending against and procuring a dissolution of said injunction. Under this head would come court costs, reasonable and necessary traveling and hotel expenses of Mulvane and his attorneys, as well as the reasonable and necessary traveling and hotel expenses of any per-
269 sons whom Mr. Mulvane may in good faith have employed for the purpose of enabling him to prevent the allowance of the injunction or to obtain its dissolution, or for the purpose of avoiding any losses or damages which were reasonably liable to flow from the allowance of the injunction.

3. Interest at the rate of six per cent. per annum on whatever sum the jury find was due from Coffin & Stanton and Woodbury & Moulton to Joab Mulvane on the contract above referred to on the tenth day of February, 1890, and which the said Joab Mulvane may have been prevented from collecting by reason of said restraining order and temporary injunction up to the date of the dissolution of said temporary injunction, which was the 14th day of April, 1890.

4. Interest on all payments made by Mr. Mulvane and for which the jury may find he is entitled to recover under these instructions, from the dates of payment to the date of verdict, at the rate of six per cent. per annum.

The court refused to give to the jury any one of the instructions so requested by the plaintiff and refused to give any part thereof; to which action and refusal of the court the plaintiff at the time excepted.

Thereupon counsel for the defendant presented to the court certain instructions in writing and asked that they be given to the jury. Said instructions are in words and figures as follows, to wit:

MULVANE)
vs.
TULLOCK.)

The defendant requests the court to instruct the jury:

I. The burden of proof is upon the plaintiff in this case to establish that at the time of bringing this suit it had been finally decided that the said temporary injunction in the case of Wescott & Hanson *vs.* Mulvane *et al.* was unlawfully issued, and that said complainants were not entitled to the said injunction. If you find from the evidence that the circuit court of the United States had prior to the bringing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott & Hanson, but that thereafter and within the time allowed therefor the said Wescott & Hanson had prosecuted an appeal from said judgment and decree to the United States circuit court of appeals and had perfected said appeal and said appeal was pending in said United States circuit court of appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought and your verdict must be for the defendant.

II. The plaintiff is not entitled to recover anything in this action on account of attorneys' fees.

III. The plaintiff is not entitled to recover anything in this action on account of expenses claimed to have been incurred by the plaintiff in the way of traveling expenses and fees to the clerk of the court — hotel bills.

IV. The plaintiff is not entitled to recover in this action for anything on account of interest on such damages as you find he sustained by reason of the granting of said temporary injunction.

V. The plaintiff is not entitled to recover in this action for interest on the amount of the contract price agreed to be paid to him by Coffin & Stanton for the water-works property.

VI. In order to entitle the plaintiff to recover for any interest upon the deferred payment of the contract price from Coffin & Stanton to him, he must establish by a preponderance of the evidence that the delay in such payment was caused solely by reason of the fault of Wescott & Hanson, and that but for the action which they took it would have been paid by Coffin & Stanton and no such delay would have occurred.

VII. The plaintiff is not entitled to recover anything in this action on account of attorneys' fees for services rendered in resisting the application of Wescott & Hansons for a temporary injunction.

VIII. The only attorneys' fees which the plaintiff is entitled to recover in this action are for legal services rendered plaintiff in procuring a dissolution of the injunction.

270 IX. If you find from the evidence in this case that a gross counsel fee was paid by plaintiff for the services rendered by the various attorneys in the suit, and that said attorneys rendered services in said cause on addition to the services in the injunction branch of the suit, and no separate or distinct amount of money was paid to the attorneys for services in relation to the injunction, and

no special charge was made therefor, the plaintiff is not entitled to recover anything on account of counsel fees.

X. The plaintiff, in any event, is entitled to recover for such reasonal le attorneys' fees as were necessarily incurred by him alone in procuring a dissolution of the temporary injunction. He was not authorized to recklessly or extravagantly employ a large number of attorneys and agree to pay them large or extravagant fees with a view of saddling such expense upon the parties to the injunction bond.

XI. The measure of attorneys' fees in any case are the fees usually obtained by attorneys of similar experience and standing for like services in the same courts or in the same vicinity in which the services were rendered.

XII. If you find from the evidence in this case that there were joined with Joab Mulvane as defendants in the suit of Wescott & Hanson against them in the United States circuit court a number of other defendants, who filed pleadings in the case and proceeded as if they had distinct interests and rights to protect, and that thereafter and after the dissolution of said temporary injunction said defendants, other than Mulvane, for a sufficient consideration, released the plaintiffs from all liability upon the injunction bond, and at the time of obtaining such release the said Wescott & Hanson had no knowledge of any claim on the part of said Mulvane that he had agreed to assume the entire burden of the defense against the injunction, and in pursuance of that agreement had paid the fees of the attorneys and appeared for his codefendants, then and in that event the plaintiff Mulvane is not entitled to recover in this action anything on account of attorneys' services rendered for any of the other defendants in said suit who signed said release or for expenses incurred on their behalf in and about the dissolution of said injunction.

XIII. If a gross fee was charged and paid to the attorneys for services rendered all of the defendants in the case and no separation or apportionment of the same was made between Mulvane and the other defendants, the defendant Mulvane is not entitled to recover for said fees."

The court refused to give to the jury any one of the instructions so requested by counsel for the defendant and refused to give any part thereof; to which action and refusal of the court the defendant at the time excepted.

Thereupon the court of his own motion instructed the jury in writing as follows, to wit:

"JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Instructions.

GENTLEMEN OF THE JURY: It is claimed on behalf of plaintiff in this case that on the 5th day of February, 1890, Wescott & Hanson

commenced suit in the United States circuit court for the district of Kansas against this plaintiff, together with other defendants in said action, and procured a restraining order to issue against this plaintiff restraining him from carrying out a certain contract which he alleges he had theretofore entered into with Coffin & Stanton by which this plaintiff was to deliver to Coffin & Stanton certain stock and bonds which it is claimed this plaintiff had agreed to deliver and for which Coffin & Stanton had agreed to pay him five hundred and fifty thousand dollars, fifty thousand dollars of which had already been paid; that a temporary injunction in said suit in the Federal court was granted against this plaintiff and his codefendants, and that Wescott & Hanson were required to and did make a cash
271 deposit of seventy-five thousand dollars in lieu of an injunction bond in said suit; that afterwards and with permission of the court the seventy-five thousand dollars cash deposit was withdrawn by Wescott & Hanson, and they were permitted to and did execute in lieu thereof an injunction bond in the sum of seventy-five thousand dollars; that thereafter such further proceedings were had in said case that the temporary injunction theretofore issued was set aside and abandoned by the plaintiff in that case. The plaintiff avers that by reason of the granting of the injunction in said suit in the Federal court against him he has been damaged, and this suit is brought for the purpose of recovering upon the injunction bond the amount of damage plaintiff claims to have sustained on account of the wrongful issuance of the temporary injunction. The plaintiff claims several different elements of damage, which the court will explain to you further on in this case. The defendant admits the execution of this injunction bond, as alleged, but denies there is any liability on his part on account of the claims of plaintiff. These are, in brief, the respective claims of the parties to this suit, which must be tried and decided according to the law as given you by the court and the facts as you have learned them from the witnesses.

1. The burden of proof in this case is upon plaintiff. It is for him to prove his cause of action by a preponderance of evidence. By a preponderance of evidence is simply meant a greater weight of evidence. When you have weighed all the evidence in this case, if you find there is a greater weight on the side of plaintiff than on that of defendant, then plaintiff has proven his cause of action by a preponderance of evidence, and your verdict should be for plaintiff; but if you find the evidence equally balanced, or if you find there is not a greater weight on the side of plaintiff than on that of defendant, then plaintiff has failed to prove his cause of action by a preponderance of evidence, and your verdict should be for defendant.

2. You are the exclusive judges of the weight of the evidence, of its credit and value. It is for you to say what credit shall be given to the testimony of the various witnesses in this case. It is your duty to reconcile all apparently conflicting testimony upon a basis of truth, if you can do so; but if, after a full and fair consideration, you are unable to do this, then you are authorized to reject such of the testimony as you may deem not entitled to credit and decide the case upon the credible evidence as you understand it.

3. You should not arbitrarily reject without cause or reason the testimony of any witness, but if you find that any witness has knowingly and willfully testified falsely to any material fact in issue, then you may in your discretion disregard the whole of such witness's testimony, although you are not bound to do so; you may still give it such weight and credit as you deem it entitled to under all the facts and circumstances proven.

4. In determining the weight to be given to the testimony of any witness you may take into consideration the manner of the witness upon the stand, the reasonableness or unreasonableness of his statements, the opportunity the witness has of knowing the facts about which he testifies, together with any interest he may have in the result of the suit, if any such interest is shown, together with all the facts and circumstances proven.

5. Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction
272 is granted may maintain an action upon the injunction bond for damage sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiffs in that suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction.

6. It is claimed on behalf of plaintiff in this case that by reason of the commencement of the suit in the Federal court against him he was required to employ attorneys to defend the injunction branch of the case in an effort to prevent the granting of a temporary injunction and in a motion to set aside the temporary injunction granted; that for this purpose he employed Hurd & Dunlap, A. L. Williams, J. D. McFarland, and Eugene Hagan to represent him in the injunction branch of said case and paid them for services so rendered the sum of sixteen thousand dollars; that the employment of these attorneys was necessary, and that the amount paid was a reasonable price for the services rendered in the injunction branch of the case.

7. In a suit on an injunction bond attorneys' fees constitute a proper element of damage, and the person against whom a temporary injunction has been granted has the right to employ a reasonable number of attorneys to represent him in the injunction branch of the case and has the right to pay the attorneys so employed a reasonable compensation for the services so rendered; but a person against whom a temporary injunction has been granted has no right to employ an unreasonable number of attorneys to represent him in the injunction

branch of the case, nor to pay the attorneys employed an unreasonable price for their services, and then recover that amount in a suit upon the bond. What would constitute a reasonable or unreasonable number of attorneys or reasonable or unreasonable fees must be determined from the character of the case, the importance of the questions involved, and the amount in controversy.

8. In this case it is for you to determine from the evidence heard whether the number of attorneys employed by the plaintiff was reasonable number and whether the amount paid was a reasonable amount for such services, because, as hereinbefore explained, the plaintiff can recover as attorneys' fees only the reasonable and customary fees in the community where the services were rendered.

9. If you believe from the evidence in this case that the plaintiff employed the attorneys claimed to have been employed and paid the amounts claimed to have been paid by him, and the number of attorneys was reasonable under all the circumstances of the case, and the amount paid was the usual and customary fees for such services, then I instruct you that plaintiff would be entitled to recover in this action upon the bond in suit the amount paid to his attorneys, with interest thereon, at the rate of six per cent., from the date of payment up to the present time; but if you find from the evidence that the plaintiff employed more attorneys than was reasonably necessary, then you have a right to disallow the amount paid by the plaintiff to such attorneys as you find to have been unnecessarily employed; or if you find that the attorneys employed were reasonable in number, but that plaintiff paid them excessive fees—that is, amounts greater than the usual and customary fees for such services rendered by them—then you would have a right to deduct from the amount paid by plaintiff any excess which you may find to have been
273 so paid.

10. It will be for you to determine in this case, from all the facts and circumstances proven, how much you will allow the plaintiff as attorneys' fees for services rendered for him in the injunction branch of the case in the Federal court.

11. It is further claimed on behalf of plaintiff that on account of the granting of the temporary injunction in the Federal court he necessarily paid out various amounts in telegraphing, in the expenses of his attorneys to Little Rock, and to D. A. Mulvane for certain trips East during the pendency of that suit and for court costs and clerical expenses.

12. As heretofore explained, the plaintiff is entitled to recover upon the injunction bond the actual damage sustained by reason of the granting of the injunction, but any and all expenditures must have been necessary and occasioned by the granting of the injunction, and unless such expenditures are necessary and occasioned by the granting of the injunction they should not be allowed. It will be for you to determine from the evidence in this case whether any or all of these expenditures claimed by plaintiff were necessary expenditures and were occasioned by the injunction. If they were, then they ought to be allowed, but if they were not they should not be

allowed, and if allowed the plaintiff would be entitled to six per cent. interest upon the amounts from date of payment.

13. It is claimed on behalf of plaintiff that he was prevented from complying with his contract with Coffin & Stanton by the issuance of the temporary injunction whereby he was to deliver on February tenth, 1890, the stock and bonds referred to in the evidence and to receive at the dates specified in the contract the five hundred thousand dollars therefor; that by reason of said injunction he was so prevented from the tenth day of February to the fourth day of April, and therefore he claims that he is entitled to recover as damages in this action interest at the rate of six per cent. per annum upon five hundred thousand dollars from February tenth to April fourth.

14. If you believe from the evidence in this case that, by reason of the granting of the temporary injunction, the plaintiff was prevented from carrying out his contract with Coffin & Stanton and thereby deprived of the use of this five hundred thousand dollars during this time, then I instruct you that plaintiff would be entitled to recover upon the injunction bond the damage so sustained, being six per cent. interest upon this amount during that period.

15. It is claimed on behalf of defendant in this case that in the injunction suit in the Federal court there was a number of defendants beside the defendant Mulvane; that all of the defendants in said suit, except the defendant Mulvane, released the defendant in this suit from any liability to them growing out of the granting of the temporary injunction; and it is further claimed that the services rendered by the attorneys representing the defendants in the injunction suit were employed to and did represent all of said defendants, and that the amounts paid by Mulvane were paid on account of and for services rendered for all of the defendants in the injunction suit.

16. The evidence in this case shows that all of the other defendants in the injunction suit have released all claims for damages growing out of the granting of said injunction, and therefore I instruct you that Mulvane could not recover in this action for any money paid on account of services rendered for the other defendants in said suit. Mulvane must be confined in this action and can only recover for money paid out on account of services performed by him, and cannot recover for money paid to attorneys for services performed by them for other of the defendants in the injunction suit.

17. Under the language of the injunction bond sued upon
274 in this case plaintiff would be entitled to recover attorney fees paid out by him in obtaining a dissolution of the injunction, and also for services of his attorneys in resisting the issuance of the temporary injunction, provided the employment of such attorneys was reasonably necessary and the amount paid the usual and reasonable fees for such services.

18. The instructions given are intended to meet the different phases of this case, and therefore you should not select some particular instruction and decide the case alone upon that, but you should take and consider all of the instructions together as being the law applicable to this case generally."

At the time of the giving by the court to the jury of the instructions above set out the plaintiff, for himself, and the defendant, for himself, each separately objected and excepted to each one of said instructions so given and to each and every part of each one of said instructions, and still excepts to the giving thereof.

Thereupon the case was argued by counsel to the jury. In the closing argument before the jury Mr. A. L. Williams, one of plaintiff's attorneys, referred to, explained, and discussed the opinion of the United States circuit court of appeals rendered in the case of Wescott & Hanson *vs.* Mulvane, which had been admitted in evidence, and contended that said suit had been maliciously brought and without probable cause therefor. At the conclusion of the argument the jury retired to the jury-room, and after due deliberation returned into open court with their verdict in favor of the plaintiff and against the defendant. Thereupon there was made upon the journal of the court an entry in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK and W. M. D. LEE, Defendants.

Journal Entry.

Upon this day this cause comes regularly on for trial. The defendant W. M. D. Lee not having been served with process, the case proceeds to trial against the defendant A. J. Tullock alone.

The plaintiff appeared by A. L. Williams and N. H. Loomis, his attorneys, and the defendant A. J. Tullock appeared by Rossington, Smith & Dallas and Clifford Histed, his attorneys.

Thereupon a jury of twelve persons were regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined.

After hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called to answer to their names, say they find a verdict for the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), said verdict being in words and figures as follows, to wit:

"'THE STATE OF KANSAS, } ss:
Shawnee County, }

In the District Court, Third Judicial District.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

Verdict.

We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, Joab Mulvane, and assess his damages against the defendant, A. J. Tullock, in the sum of $25,000.00.

JAMES BURGESS, *Foreman.*'

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered, and adjudged that said plaintiff, Joab Mulvane, do have and recover from said defendant, A. J. Tullock, the sum of twenty-five thousand dollars ($25,000.00), with interest thereon, at the rate of six per cent. per annum, from the date hereof until paid, together with the costs of this action, amounting to the sum of — dollars, for which let execution issue.

To which judgment and decision of the court and to every part thereof the defendant excepts.

Dated June 17, 1898."

Afterwards and on the 18th day of June, 1898, and during the April term of the court and within three days from the rendition of said judgment, the defendant, by his attorneys, filed in the
275 office of the clerk of the court a motion for a new trial, and upon oral application to the court obtained a stay of execution pending the hearing of said motion. Said order of the court, as the same was then entered upon the journal of the court, is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

On this 18th day of June, 1898, comes the defendant and files his motion for a new trial in the above-entitled cause, and upon application of the defendant it is ordered that pending the hearing and determination of said motion for a new trial execution be stayed herein.

Z. T. HAZEN, *Judge.*"

Said motion for a new trial which was filed by the defendant is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Motion for a New Trial.

Now comes the defendant, A. J. Tullock, and respectfully moves the court here to vacate and set aside the verdict of the jury returned in this case and to grant said defendant a new trial therein for the following reasons, affecting materially the substantial rights of said defendant:

First. An irregularity in the proceedings of the court and prevailing party and abuse of discretion by which this defendant was prevented from having a fair trial.

Second. Misconduct of the jury and prevailing party.

Third. Accident or surprise which ordinary prudence could not have guarded against.

Fourth. Excessive damages appearing to have been given under the influence of passion or prejudice.

Fifth. Error in the assessment of the amount of recovery, the same being too large.

Sixth. That the verdict is not sustained by sufficient evidence and is contrary to law.

Seventh. Newly discovered evidence material for the defendant which could not with reasonable diligence have been discovered and produced at the trial.

Eighth. Errors of law occurring at the trial and excepted to by the defendant at the time.

ROSSINGTON, SMITH & DALLAS,
Attorneys for said Defendant."

Afterwards and on the first day of July, 1898, and during the same term of the court, said motion of the defendant for a new trial came regularly on for hearing and was presented and argued by counsel to the court. At the conclusion of the argument the court took said motion under advisement.

Afterwards and on the 6th day of September, 1898, the court announced his decision upon said motion for a new trial, and there was made upon the journal of the court a record thereof in words and figures as follows, to wit:

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Now, on this 6th day of September, 1898, the motion of the defendant for a new trial of this case came regularly on for decision, the same having been heretofore heard and taken under advisement by the court. The plaintiff appears by his attorneys and the defend-

ant appears by his attorneys. Thereupon the court, after due consideration and being well advised in the premises, finds that said motion of the defendant for a new trial should be overruled, and it is therefore ordered by the court that said motion be, and the same is hereby, denied and overruled; to which finding and ruling of the court the defendant excepts.

Upon application of the defendant and for a good cause shown the said defendant is allowed ninety days from this date in which to make and serve upon the plaintiff a case-made for the supreme court, and execution herein is stayed during said ninety days.

This case-made for the supreme court contains full, true, and correct copies of all pleadings, files, and motions in this case; full, true, and correct copies of all orders of the court, journal entries, judgments, and decisions in this case; a full, true, and correct
276 transcript of all testimony and evidence offered and admitted upon the trial of the case and full, true, and correct copies of all exhibits offered or admitted in evidence upon said trial; a full, true, and correct record of all objections, oral motions, and exceptions made or taken during the trial of the case, and a full, true, and correct history of this action and of the proceedings taken herein from the filing of the original petition to the present time. The above and foregoing case-made for the supreme court has been this day served upon us as attorneys for the plaintiff, and we do hereby acknowledge the service of the same.

Topeka, Kansas, October 19th, 1898.

N. H. LOOMIS,
Attorneys for Plaintiff.

In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

STATE OF KANSAS, }
Shawnee County, } *ss:*

I, Z. T. Hazen, judge of the district court of Shawnee county, Kansas, do hereby certify that the above and foregoing was presented to me as a case-made in the action above entitled; that at the time of such presentation both plaintiff and defendant were represented by their attorneys, and no amendments to said case-made were suggested; and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand, at Topeka, in said county and State, this 14th day of November, 1898.

Z. T. HAZEN,
Judge of the District Court of Shawnee County, Kansas.

Attest: E. M. COCKRELL,
Clerk of the District Court of
Shawnee County, Kansas. [SEAL.]

Filed Nov. 19, 1898.

E. M. COCKRELL, *Clerk*,
By I. S. CURTIS, *Deputy*.

277 And also, on the 23rd day of November, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which is in the words and figures as follows, to wit:

278 In the Supreme Court of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Security for Costs.

We and each of us enter as security for all costs which may accrue to said defendant in error or to the officers of this court herein; and in default of payment by said plaintiff in error of said costs and after ten days' notice we agree that execution may issue against our property for unpaid costs.

ALONZO J. TULLOCK.
ALBERT J. SCHILLING.

(Indorsed on back:) No. 11319. A. J. Tullock *vs.* Joab Mulvane. Bond for costs. Approved. Filed Nov. 23, 1898. Jno. Martin, clerk supreme court. This bond is perfectly good. Rossington, Smith & Dallas, attorneys for plaintiff in error.

279 And afterwards, on the 8th day of November, 1899, the same being one of the regular judicial days of the July term, 1899, of the supreme court of the State of Kansas, in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

280 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error,
vs.
JOAB MULVANE, Def't in Error. } Journal Entry of Continuance.

On motion of R. W. Blair, appearing as attorney for defendant in error, it is ordered that the further hearing of this cause be continued to the February, 1900, session of this court.

281 And afterward, on the 6th day of February, 1900, the same being one of the regular judicial days of the January term, 1900, of the supreme court of the State of Kansas, in session at the

supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

282 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error, vs. JOAB MULVANE, Def't in Error. } Journal Entry of Submission.

This cause comes on to be heard on petition in error and transcript of the record of the district court of Shawnee county, and thereupon said cause was argued by W. H. Rossington, of counsel for plaintiff in error, and N. H. Loomis, of counsel for defendant in error, and taken under advisement by the court.

283 And afterwards, on the 7th day of April, 1900, the same being one of the regular judicial days of the January term, 1900, of the supreme court of the State of Kansas, in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

284 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error, vs. JOAB MULVANE, Def't in Error. } Journal Entry of Decision.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $100.00, and hereof let execution issue.

285 And also, on the said 7th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of the court in said cause, which are in the words and figures as follows, to wit:

286 A. J. TULLOCK vs. JOAB MULVANE. } No. 11318.

Error from Shawnee county. Affirmed.

Syllabus—Doster, C. J.

1. Mulvane *v.* Tullock, 58 Kan., 622, affirmed and followed.
2. When a petition claiming damages is not demurrable for insufficiency in its statements of fact to constitute a cause of action, but is only subject to a motion to make it more definite and

certain as to the allegations of damage sustained, and upon a first trial is had in the course of which the plaintiff makes a full disclosure of the several items constituting his demand, it is not error upon a second trial and at the close of the plaintiff's evidence during which the same disclosures were made to allow the petition to be amended by setting out the various items of damages claimed so as to conform to the evidence given. Walker *et al. v.* O'Connell, 59 Kan., 306, distinguished.

3. When an action is brought to compel the specific performance of a contract of sale, and as incident thereto for an injunction to restrain a sale of the property in question to another person, and the plaintiff voluntarily dismisses his action as one for specific performance and elects to continue it as one for damages for non-performance, the dismissal operates as an
287 abandonment of the claim for injunction as well as the claim for specific performance, and an action will at once lie upon the injunction bond given in the case without awaiting the termination of the suit for damages. Brown *v.* Galena Mining & Smelting Co., 32 Kan., 528, distinguished.

4. An order of court dismissing a proceeding for an injunction made upon the application of the party who instituted the proceeding is a final decision that the injunction ought not to have been allowed, and an action will thereupon lie upon the injunction bond. Mitchell *v.* Sullivan, 30 Kan., 231, affirmed and followed.

5. When the judgment in a cause does not clearly disclose the questions at issue and decided, nor does the mandate of affirmance of a reviewing court to which the cause has been appealed make such disclosure, the written opinion of the appellate court may be introduced in evidence to ascertain the issues involved and actually decided.

6. Charges for attorneys' services may be rightfully made in view of the special importance of the litigation to the client, as that the successful termination of the suit has saved him from bankruptcy, and in such case, if the party has made payment of fees to correspond with the special importance of the litigation to himself, and if for any reason the amount paid constitutes a demand chargeable to another person, the special facts showing the importance of the case may be proved, and a hypothetical question as to the value of the services based thereon may be asked of qualified witnesses.

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A. J. TULLOCK)
v.) No. 11318.
JOAB MULVANE.)

Error from Shawnee county. Affirmed.

The opinion of the court was delivered by DOSTER, C. J.:

This is the second time this case has been before us—Mulvane *v.* Tullock, 58 Kan., 622. When first here it was reversed, principally

for the reason that the court below erred in holding that the expen
ture of attorneys' fees in procuring the dissolution of an injunct
in the Federal courts was not recoverable as damages in a suit up
the injunction bond. After the return of the case to the lower co
a trial was had, resulting in a verdict and judgment for the pla
tiff Mulvane in the sum of twenty-five thousand dollars, princip
for attorneys' fees expended by him in procuring a vacation of t
injunction order. The defendant Tullock has prosecuted error
this court.

Summarized, the facts were that Mulvane had contracted to s
to the firms of Coffin & Stanton and Woodbury & Moulton the c
ital stock of the Topeka Water Supply Company for the sum of fi
hundred and fifty thousand dollars. The firm of Wescott & Hans
claimed that Mulvane had previously contracted to sell the sa
stock to them, and they accordingly brought an action in the Unit
States circuit court to compel a specific performance of the agre
ment to sell to them and for an injunction restraining t
289 execution of the contract for the sale and delivery of the sto
to Coffin & Stanton and Woodbury & Moulton. The gran
ing of the order of injunction was resisted by Mulvane. It wa
however, allowed, but was subsequently dissolved by the circu
court. A condition to the allowance of the injunction was the d
posit of seventy-five thousand dollars in money in lieu of an injun
tion bond and as security for the damages the defendants might su
tain. The order for the making of the cash deposit was subsequentl
changed to allow the substitution of an injunction bond. This bon
was given and is the one now in suit. Subsequently an agreemen
was made between the complainants and the defendants by whic
the bill for specific performance was dismissed, but the case wa
allowed to proceed as though at law for damages for non-perform
ance instead of in equity for specific performance. However, it wa
agreed that the stipulation of dismissal should in no manner "en
large or lessen or in any manner affect the rights or remedies of th
said Mulvane against the complainants in this or any other action.
Subsequently the bill for damages was heard and was dismissed wit
costs in favor of the defendant Mulvane. Soon after the making
the order last mentioned suit was instituted upon the injunctio
bond. Subsequently the complainants appealed to the circuit cou
of appeals from the order of dismissal entered in the circuit cour
The circuit court of appeals, upon a hearing, affirmed the order
dismissal made by the circuit court.

The contentions in behalf of the plaintiff in error, stated in th
order made by him, are, first, that attorneys' fees are not allowabl
as damages in a suit on an injunction bond given in a case in th
Federal court, but that in the event of a dissolution of the injunc
tion and the consequent occurrence of a liability upon th
290 bond the court granting the injunction awards damages upo
the bond in a proceeding ancillary to the injunction cas
This was the main contention of Tullock, the surety on the bond
when the case was here before. It was fully considered then an
held to be unfounded. No additional arguments have been ad

vanced or additional authorities cited influencing us to take a different view of the question.

It is next contended that attorneys' fees are not recoverable under the petition as originally framed, and that the court erred in permitting an amendment to the petition specifically itemizing the claim for attorneys' fees and demanding judgment therefor. The claim for damages made in the petition previous to its amendment read as follows: "Plaintiff further alleges that he has received damages caused by the issuance of said injunction in the sum of seventy-five thousand dollars, for which sum of money he prays judgment." No motion to require this petition to be made more definite and certain in respect to the items of damage claimed was made, but upon the allegation above quoted the parties proceeded to the trial first had previous to the reversal of the case before mentioned, as well as to the last trial, from which the present proceeding in error was prosecuted. Upon the first trial the several items of the plaintiff's demand for damages were specifically stated and testified to by him. The defendant became fully aware upon that trial of the particulars constituting the plaintiff's demand for attorneys' fees and other damages. Upon the second trial objections were made to the reception of evidence for the reason that the claim for damages was insufficiently pleaded. The objection was overruled, but at the close of the plaintiff's evidence he asked and obtained leave to amend his petition to correspond with his proof by itemizing the various
291 sums constituting his demand. Although upon the making of the amendment to the petition the plaintiff's counsel asked for a postponement of the trial because of the allowance of the amendment, yet the request was not made upon the ground that they had been misled or surprised by the plaintiff's testimony or the making of the amendment, or that they had been ignorant of the items of the plaintiff's demand and were unprepared with counter-evidence, nor indeed could such claim of surprise or ignorance have been made, because, as before stated, the case had once before been tried and a full disclosure of the plaintiff's demand had then been made. The case in that respect is unlike Walker *et al. v.* O'Connell, 59 Kan., 306, and is unlike it in the further respect that the petition in that case lacked an essential averment—one without which it was demurrable for insufficiency of facts to constitute a cause of action—while in this case the petition as originally framed was not demurrable for insufficiency, but subject only to a motion to make it more definite and certain, which motion, so far as we are advised or the record before us shows, was never made.

It is next claimed that the action was prematurely brought because instituted while the appeal of Wescott & Hanson from the decree of dismissal of their bill was pending in the circuit court of appeals. As before stated, the bill of Wescott & Hanson for specific performance was dismissed by them, and the action thereafter proceeded as one for damages for breach of contract. Although the suit upon the injunction bond was not brought until after the voluntary dismissal of so much of complainant's bill as prayed for specific performance and not until after the trial subsequently had of

the bill for damages and the adverse decision made therein, the plaintiff in error claims that the right of action upon the in-
292 junction bond became stayed as a consequence of the appeal from the order dismissing the bill for damages. This claim is untenable, and especially so in view of the decision subsequently rendered by the circuit court of appeals upon the hearing of the appeal.

In its opinion that court remarked:

"It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think it all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn, the injunction necessarily shared the same fate."

Wescott *et al. v.* Mulvane, 58 Fed., 308.

In the view of the circuit court of appeals the dismissal of the bill for specific performance was a dismissal of the incident claim for an injunction. In this view we fully concur. The effect of the voluntary dismissal was to abandon the claim for an injunction and to ripen the hitherto contingent liability upon the injunction bond into one of absolute character. The appeal was not from the order dismissing the bill for specific performance, because that dismissal was had at the instance of the complainants themselves. The appeal was not from the order dismissing the bill for injunction, because that dismissal was involved in the dismissal of the claim for specific performance and was likewise voluntary, as above shown. The appeal was from the order dismissing the bill for damages. With the character of the bill as one for damages the prayer for injunction was nowise related. There was no appeal from the order dismissing the injunction feature of the bill, and nothing in the controversy which was retained before the court which had the effect to
293 suspend liability upon the injunction bond. There is nothing in the case of Brown *et al. v.* The Galena Mining & Smelting Co. *et al.*, 32 Kan., 528, which militates against this view. In that case it was held that:

"In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order until a final judgment in the suit in which it was issued is rendered; and a suit commenced on such undertaking, before such entry of judgment, is prematurely brought and cannot be maintained."

The sole purpose of the suit in that case was to obtain a perpetual injunction. The injunction asked for was not auxiliary to some other relief prayed for. It was therefore rightly held that a suit

upon the injunction bond would not lie merely because the temporary order had been vacated, because upon the final hearing a perpetual injunction might have been allowed, notwithstanding the vacation of the temporary order. The injunction bond in that, as in all other cases, was conditioned for the payment of damages "if it be finally decided that the injunction ought not to have been granted," and until final hearing it could not have been finally so decided. But in a proper sense it had been finally decided that the injunction order in the case of Wescott *et al. v.* Mulvane ought not to have been granted. The case is within the principle of Mitchell *v.* Sullivan *et al.*, 30 Kan., 231. In that case it was ruled:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary order of injunction, and after the judgment an action lies upon the injunction undertaking."

It is next contended that the contingency specified in the injunction bond, upon the occurrence of which the liability of the
294 sureties depended, never happened. The argument in support of this contention is that it never was finally decided that the injunction ought not to have been granted, but that without awaiting a decision upon the question the bill for injunction was voluntarily dismissed. There are two sufficient answers to this claim. First, a party cannot wrongfully sue out an injunction against his adversary and escape liability for the damages which consequently follow by voluntarily dismissing his action in anticipation of an adverse decision. In such case the order of dismissal made upon the complainants' application is an adjudication that the injunction ought not to have been granted. This point is expressly decided in Mitchell *v.* Sullivan *et al.*, *supra*; but an equally conclusive reply to the plaintiff in error in this respect is that in the case of Wescott *et al. v.* Mulvane it was finally decided that the injunction ought not to have been granted. Before the complainants voluntarily dismissed their bill for injunction a hearing was had as to the rightfulness of granting it in the first instance. Upon that hearing an order dissolving the injunction was made. While in chancery practice the rightfulness of all interlocutory orders come up for review again upon final hearing, yet unless reversed or otherwise changed upon the final hearing they become final decisions either as of the time when made or as of the time of review.

It is next contended that there was a failure to separate the attorneys' fees which Mulvane claimed he had paid in the injunction branch of the case from those paid for defending the bill for damages for non-performance of contract, and also that a portion of that for which he made claim was paid for services not rendered to him, but rendered to other defendants in the injunction proceeding. We

have examined the evidence as to this. The plaintiff in error
295 is mistaken. We have also examined the instructions of the court in respect to the apportionment of attorneys' fees between the several parties, and in respect of the separate contracts for attorneys' services in the case, and likewise have examined the requests for instructions upon those subjects made by plaintiff in error and find no error committed in the instructions given nor in refusing the requests for instructions. It is next contended that the court erred in admitting as evidence in the case the opinion of the circuit court of appeals—Wescott *et al. v.* Mulvane, *supra*. The principal ground upon which this contention is made is that the opinion of a court does not constitute a part of the record in the case, and in addition to this it is claimed that the résumé of facts contained in the opinion in question was in the nature of evidence upon controverted points, and was therefore hearsay in character. The opinion of a court does not ordinarily constitute a part of the record of the case, and is therefore inadmissible except for certain purposes. It is, however, admissible in all cases if necessary to explain or characterize the points at issue in a case and decided by the court. There are some few holdings to the contrary, but the general rule is as stated. This case is an instance of the propriety of using the opinion of a court for the purpose of an understanding of the judgment rendered by it. It was, of course, necessary for the plaintiff in the court below to prove that the injunction issued against him had been dissolved, and that a final decision had been made that such injunction ought not to have been granted. The best evidence of those facts was, of course, the record of the Federal courts trying the case. For the purpose of record evidence the mandate to the circuit court issued by the circuit court of appeals was introduced. That man-
296 date recited the fact of the proceeding in the circuit court, the appeal to the circuit court of appeals, and the hearing of the appeal in the last-named court. The mandate concluded in the two following paragraphs:

"In consideration whereof it is ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Joab Mulvane recover against George P. Wescott and Samuel Hanson the sum of twenty dollars for his costs herein and have execution therefor, October 16th, 1893.

You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

It will be observed that this mandate did not disclose the particulars or even the general nature of the decree of the circuit court which had been affirmed by the circuit court of appeals. To ascertain the decision of the first-named court, which had been affirmed by the one last named, it became necessary to resort to extrinsic evidence. It is true that the record of the circuit court was in evidence, and that such record showed that the bill of complainant had been dismissed, but the ground of the dismissal was not stated in that record with the particularity necessary to a complete under-

standing of the case, and to a full knowledge of the fact that it had been finally decided that the injunction ought not to have been granted, or necessary to a knowledge of the fact that in the judgment of the court the dismissal of the bill for specific performance carried with it a dismissal of the incident claim for injunction. Hence the opinion of the circuit court of appeals was proper if not necessary in explanation of the points in issue and of the thing finally adjudicated. The law is quite well settled that for purposes of such explanation the opinions of courts are receivable in evidence. Van Fleet's Former Adjudication, vol. 1, sec. 278. A trial court in giving effect to the mandate of the appellate tribunal should construe
297 the mandate in the light of the opinion of the reviewing court—Enc. of Plead. & Prac., vol. 13, 847—and for the same reason when necessary for any purpose to an understanding of the mandate or judgment of a court its accompanying opinion may be examined. Van Fleet's Former Adjudication, vol. 2, sec. 421.

But independently of the rule of the admissibility of the opinions of judges to identify the points decided and the judgments rendered, and assuming the non-existence of such rule, there was nothing in the opinion of the circuit court of appeals prejudicial to the defense of the defendant in the court below. The recitals of fact contained in it were not different from the facts proved upon the trial of the case, and the error, if it were to be called such, would therefore have to be regarded as unsubstantial and harmless.

It is next contended that a hypothetical question as to the value of the attorneys' services was based in part upon certain assumptions of fact, not facts given in evidence, and also that it contained a certain element not admissible to be stated in the question or considered by the jury. As to the first of these objections the plaintiff in error is mistaken. The hypothetical question in the particulars mentioned had a basis in the evidence. As to the other objection the plaintiff in error is also mistaken. The defendant Mulvane had testified that because of the nature of his business at and about the time of the making of the contract for the sale of the water-works stock, and in particular on account of obligations he had assumed in purchasing some of it from other stockholders, he would have been bankrupt had not the injunction prohibiting the completion of the sale to Coffin & Stanton and Woodbury & Moulton been dissolved. The importance of the litigation to him in view of this state of his business affairs was made an element of the hypothetical question asked. There is no error in this. The general rule is that the importance of a case
298 to the client and the benefits received by him through the successful termination of the litigation, as well as the general nature and character of such litigation and the questions of law and fact involved in it, may be considered in determining the value of the legal services performed and the compensation to which the attorney is entitled. In a general way this rule was remarked upon in Ottawa University *v.* Parkinson, 14 Kan., 160. In the case of Bentley *v.* Brown, 37 Kan., 14, it was said that it is the duty of the court in determining the value of legal services to take into consideration "the terms of employment, the character of the litigation

in which the services were performed, the time occupied, and the benefits resulting to the defendant from the services." In Selover *et al. v.* Bryant, 54 Minn., 434, an instruction to the jury that in arriving at the compensation justly payable for attorneys' services their value to the client should be taken into account was approved by the court. The point was disposed of in the following paragraph of the opinion:

"The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiff) 'to Mrs. Bryant' should be considered by the jury. There was no error in this. The court did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things the importance and results of the case are to be considered. The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety, and effort demanded of and to be born- by the attorney, and should not be disregarded in their bearing upon the question of the value of such services."

We take it that if the hypothetical question had merely stated that the litigation was of great pecuniary importance to Mulvane no objection worthy of consideration could or would have been made. If it would have been proper to state in general terms that the litigation was of great financial importance, no reason is perceived
299 why the particular facts showing its importance might not be stated.

The bond given by the plaintiff in error was conditioned to pay all damages which the defendant in error might sustain. This was not, of course, an obligation to pay damages remote, conjectural, or speculative in character, but only to pay such damages as were the actual, natural, and proximate result of the granting of the injunction order. High on Injunctions, 3 ed., sec. 1663. The natural and probable result of the issuance of the injunction order was the employment of attorneys to procure its dissolution and the payment to them of fees commensurate with the services performed. There was no way of apportioning the compensation charged by the attorneys for services performed without the element of exertion to save from impending bankruptcy or exertion to save because of it. Perhaps, if the injunction had continued for such length of time as to have resulted in Mulvane's bankruptcy, the plaintiff in error would not have been liable to him for the restoration of his fortune, because the bankruptcy of the defendant in an injunction proceeding is not the natural or ordinary result of the injunction order; but the natural and ordinary consequences of an injunction order *is* the payment of counsel fees commensurate, among other things, with the special importance of the case to the defendant and the special results accruing to him through the dissolution of the injunction order. The surety in such cases is required to know that the defendant in the injunction proceeding will put forth all necessary

efforts to save himself from all harmful consequences, and the obligation assumed by the surety is to reimburse the defendant for all expenses reasonably and necessarily incurred in averting such consequences.

Lastly, it is claimed that the damages awarded were ex-
300 cessive. This was entirely a question of fact for the jury. Evidence of attorneys of long experience, large practice, and high professional character was taken, and much of it fully supported the verdict rendered. The verdict, therefore, is conclusive upon us.

There is no error in the record, and the judgment of the court below is affirmed.

301 And afterwards, on the 18th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a writ of error, which, with all the endorsements thereon, is in the words and figures as follows, to wit:

302 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,)
vs
JOAB MULVANE, Defendant in Error.)

Petition for Writ of Error.

Comes now the said Andrew J. Tullock, plaintiff in error herein, and says that on the 7th day of April, A. D. 1900, this court entered judgment herein in favor of the defendant in error and against the plaintiff in error, in which judgment and in the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff in error, and, as this plaintiff in error complains and says, against a right, privilege, and immunity claimed to exist by virtue of a clause of the Constitution of the United States and a statute of and commission held or an authority exercised under the United States, all of which will more fully and at length appear by the assignment of errors which is filed with this petition in error.

Wherefore this plaintiff in error prays that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

ROSSINGTON, SMITH & HISTED,
Att'ys for Plaintiff in Error.

303 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tff in error, *vs.* Joab Mulvane, def't in error. Petition for writ of error. Filed Apr. 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24 Crawford building, Topeka, Kansas, attorneys for pl'tff in error.

304 And also, on the 18th day of April, 1900, before the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, at his chambers, in the city of Topeka, the following proceeding was had and entered of record as follows, to wit:

305 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Order Allowing Writ of Error.

Now comes the said Andrew J. Tullock, plaintiff in error in the above-entitled cause, by Rossington, Smith & Histed, his attorneys, and presents to the undersigned, chief justice of the supreme court of the State of Kansas, his petition herein praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said application for writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted and the said writ of error allowed.

The said plaintiff in error, having superseded the judgment of the court below by a good and sufficient bond, now on file in this court, presents his bond for costs on said writ of error in the sum of one thousand dollars, with American Surety Company as surety thereon.

306 In consideration whereof the said bond and the sufficiency of the sureties thereupon is hereby approved by me.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

(Indorsed on back:) No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Order allowing writ of error and approval of bond. Filed April 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, attorneys for pl'ff in error.

307 And also, on the 18th day of April, 1900, there was filed with the petition for writ of error in the office of the clerk of the supreme court of the State of Kansas an assignment of errors in the above-entitled cause, which, with all the endorsements thereon, is in words and figures as follows, to wit:

308 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Assignment of Errors.

Comes now the said Andrew J. Tullock, plaintiff in error, and submits herein, in support of his petition for writ of error, his certain assignment of errors which he avers appears in the record of said cause in this court:

I.

The supreme court of the State of Kansas erred in affirming the judgment of the district court of Shawnee county.

II.

The supreme court of the State of Kansas erred in failing and refusing to reverse the judgment of the said district court.

III.

The supreme court of the State of Kansas erred in sustaining the judgment of the court below awarding to the defendant in error attorneys' fees as part of the damages recoverable in the action, and in sustaining the action of the court below in refusing to grant the instruction requested by said plaintiff in error that the said defendant in error was not entitled to recover anything in this action on account of attorneys' fees for the reason that the bond upon which said suit was brought was given in the circuit court of the United States and is governed as to the liability upon it by the law as established by the Supreme Court of the United States.

IV.

309 The said supreme court of the State of Kansas erred in not holding to be erroneous and reversing said cause therefor the ruling of the court below allowing proof of special damages when the same had not been properly pleaded and petitioned, and at the conclusion of the plaintiff's evidence, and after the demurrer to the evidence had been considered and overruled, in allowing the plaintiff to amend his petition by setting out attorneys' fees paid and claiming recovery therefor.

V.

The supreme court of the State of Kansas erred in failing to hold the action of the court below erroneous in overruling the plea and objection of the defendant to the effect that said action was prematurely brought.

VI.

The supreme court of the State of Kansas erred in refusing to hold as error the following instruction given by the court below, to wit:

"Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damages sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiff in the suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction."

VII.

The supreme court of the State of Kansas erred in not reversing the said cause and holding to be erroneous the refusal of the court below to give to the jury upon the request of the plaintiff in error the following special instruction:

"If you find from the evidence that the circuit court of
310 the United States had prior to the bringing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott & Hanson, but that thereafter within the time allowed therefor the said Wescott & Hanson had prosecuted an appeal from said judgment and decree to the United States circuit court of appeals and had perfected their said appeal and said appeal was pending in said United States circuit court of appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought, and your verdict must be for the defendant."

VIII.

The supreme court of the State of Kansas erred in not holding as error and reversing said cause the ruling of the court below in admitting, over the objection of said plaintiff in error, as evidence to sustain the allegation of plaintiff's petition that a final decision had been had, that said injunction had been unlawfully granted, the stipulation entered into on October 7th, 1890, and set out in said record, and in holding that such evidence was not a variance and departure from the provisions of said bond and the allegations of said defendant in error's petition or a breach thereof.

IX.

The supreme court of the State of Kansas further erred in not reversing said cause, with a judgment in favor of said plaintiff in error, it appearing from said record that said plaintiff in error had demanded judgment from the court below because the liability of the said Tullock was that of surety upon said bond, and the liability

which he had assumed upon said bond was a specific one and could not accrue by the acts of the parties in making the said stipulation and agreement, but was discharged thereby, and the court below should not have given effect to said stipulation and agreement of the parties as binding upon the said plaintiff in error as surety, inasmuch as the said stipulation was not a final decision of the rightfulness of granting such injunction, and that a final decision in respect thereto was by said stipulation and agreement, by the acts of the parties, without notice to or acquiescence by the said Tullock, made impossible.

311 X.

The supreme court of the State of Kansas erred in holding:

1st. That the plaintiff was entitled to recover anything in said action on account of attorneys' fees for services rendered in resisting the application of Wescott & Hanson for a temporary injunction, and, further, in failing to hold that if attorneys' fees could be allowed at all, they could only be for legal services rendered plaintiff in procuring a dissolution of the injunction, and to be strictly limited to such services.

XI.

The said supreme court erred in sustaining the contention of said defendant in error as to attorneys' fees, and by upholding the instructions and rulings of the court below against the exception of the defendant, because from the record herein it does not appear that there was any separation and apportionment of the gross fees charged and paid between those due for services rendered in procuring a dissolution of the injunction and those rendered generally in the case.

2nd. Because it does not appear that there was a separation and apportionment of the value of the services rendered by said attorneys on behalf of the Topeka Water Company, the Topeka Water Supply Company, and Coffin & Stanton from the services rendered to the said defendant in error, Joab Mulvane.

3rd. Because the said supreme court sustained the court below in permitting a recovery for a gross attorneys' charge for a stipulation and agreement said to have been made by Mulvane with the other defendants in the case, that he, Mulvane, would bear the entire charge of attorneys' fees and expenses for said parties, although no notice of such stipulation or agreement was brought to the attention of Wescott & Hanson, or the said plaintiff in error, or the at-
312 torneys for said Wescott & Hanson, prior to or subsequent to the filing of the stipulation dismissing said defendants from the cause wherein said defendants, in consideration of such stipulation, released all claims and damages whatsoever; and,

4th. Because the court permitted proof and charge for payment of more than one attorney fee to more than one attorney or firm of attorneys for such services in said cause.

XII.

The said supreme court erred in sustaining the ruling of the court below and failing to hold as error the permitting of the opinion of the United States circuit court of appeals in the cause of Wescott & Hanson *vs.* Mulvane *et al.* to be read to the jury as evidence.

XIII.

The said supreme court erred in failing to reverse said cause and not holding as error the ruling of the court below permitting the plaintiff's hypothetical question, which appears at large in said record and is too lengthy and voluminous to be herein set out, as to the value of the attorneys' services, to be asked the witnesses, because the same contains allegations of fact not sustained by the evidence, and, if sustained by the evidence, as involving an improper element in estimating and determining what services should be worth.

XIV.

The said supreme court of the State of Kansas erred in failing to hold to be erroneous the action of the court below in overruling the motion for a new trial.

ROSSINGTON, SMITH & HISTED,
Attorneys for Plaintiff in Error.

313 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Assignment of errors. Filed Apr. 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24 Crawford building, Topeka, Kansas, attorneys for pl'ff in error.

314 And also on the 18th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond, with all of the endorsements thereon, is in the words and figures as follows, to wit:

315 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Know all men by these presents that A. J. Tullock, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the said Joab Mulvane, defendant in error, his heirs, executors, and administrators, in the sum of one thousand dollars, lawful money of the United States, the payment of which, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

Signed and sealed by us this 18th day of April, A. D. 1900.

Whereas the above-bounden A. J. Tullock hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the — bounden A. J. Tullock shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

316 In witness whereof we have hereunto set our hands and the seal of the said American Surety Company of New York the day and date last above written.

[SEAL.] A. J. TULLOCK.
AMERICAN SURETY CO. OF N. Y.,
By P. I. BONEBRAKE, *Res. Vice-President.*

Attest: H. E. VALENTINE,
Res. Assistant Secretary.

[Revenue stamp, 5 cents, cancelled.]

(Indorsed on back:) No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Bond. Filed April 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, attorneys for pl'ff in error.

317 And afterwards, on the 19th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached, and is in the words and figures as follows, to wit:

318 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. J. Tullock, plaintiff in error, and Joab Mulvane, defendant in error, wherein there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty,

statute, or commission, a manifest error has happened, to the great great damage of the said A. J. Tullock, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record

319 and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred.

[The Seal of the Circuit Court of the United States, District of Kansas.]

GEO. F. SHARITT,
Clerk of the United States Circuit Court
for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice.

320 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tiff in error, *vs.* Joab Mulvane, def't in error. Writ of error. Filed April 9, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for pl'tiff in error

321 And also, on the 19th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, together with a- acknowledgement of service, the original of which, together with the endorsements thereon, is in the words and figures as follows, to wit:

322 UNITED STATES OF AMERICA:

To Joab Mulvane, of Topeka, Shawnee county, Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you are defendant in error and A. J. Tullock is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Honorable Frank Doster, the chief justice of the supreme court of the State of Kansas, this 18th day of April, A. D. 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of this citation hereby acknowledged on the 18th day of April, A. D. 1900.

N. H. LOOMIS,
Att'y for Joab Mulvane.

323 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tff in error, *vs.* Joab Mulvane, def't in error. Citation. Filed Apr. 19, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for pl'tff in error.

324 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in said court in the above-entitled cause as the same remains on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 28th day of April, A. D. 1900.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No., 17,750. Kansas supreme court. Term No., 275. A. J. Tullock, plaintiff in error, *vs.* Joab Mulvane. Filed May 10th, 1900.